

## **Downing, Donna**

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**From:** Downing, Donna  
**Sent:** Thursday, March 19, 2015 9:17 AM  
**To:** David Evans  
**Subject:** FW: special case

"Didn't know this" that you heard from David Lewis. But I can't tell from the email chain what wasn't known.

I did read in the press article of last week that Region 9 had requested a Cargill special case in May 2014 which HQ subsequently denied. Didn't know either of those factoids. Was that what you didn't know either??

Just curious.

Yours in customary ignorance,  
Donna

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**From:** Eisenberg, Mindy  
**Sent:** Thursday, March 19, 2015 8:02 AM  
**To:** Kaiser, Russell  
**Cc:** Evans, David; Miller, Clay; Downing, Donna; Best-Wong, Benita; Goodin, John  
**Subject:** Re: special case

Actually I believe this one (if it's to multiple NGOs) was assigned to us but Greg said it should be reassigned to the region.

Sent from my iPhone

On Mar 19, 2015, at 7:30 AM, "Kaiser, Russell" <[Kaiser.Russell@epa.gov](mailto:Kaiser.Russell@epa.gov)> wrote:

We talked very briefly yesterday and nothing was said about the letter. Actually, I wonder if Greg even knows about it... I am going to share with him and Gautam... Thanks, Russ

**Russell L. Kaiser**  
**Chief, Wetlands & Aquatic Resources Regulatory Branch**  
**1301 Constitution Ave., N.W.**  
**Room 7217M West Bldg.**  
**Washington, DC 20004**  
**P: 202.566.0963**

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**From:** Evans, David  
**Sent:** Thursday, March 19, 2015 7:21 AM  
**To:** Kaiser, Russell; Eisenberg, Mindy; Miller, Clay; Downing, Donna; Best-Wong, Benita; Goodin, John  
**Subject:** FW: special case

I didn't know this....  
Sent from my Windows Phone

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**From:** David Lewis  
**Sent:** 3/19/2015 1:07 AM  
**To:** Evans, David  
**Subject:** FW: special case

ICYMI, somehow.

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**From:** Diamond, Jane [<mailto:Diamond.Jane@epa.gov>]  
**Sent:** Wednesday, March 18, 2015 6:36 PM  
**To:** David Lewis  
**Cc:** Scianni, Melissa; Brush, Jason; Woo, Nancy; Kao, Jessica  
**Subject:** special case

In follow up to EPA's March 6 correspondence.

Jane Diamond  
Water Director, EPA Region 9  
415-947-8707

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**From:** Diamond, Jane  
**Sent:** Friday, March 06, 2015 2:39 PM  
**To:** David Lewis ([dlewis@savesfbay.org](mailto:dlewis@savesfbay.org))  
**Subject:** EPA response to your letter to the Administrator re the Saltworks

Jane Diamond  
Water Director, EPA Region 9  
415-947-8707

## **Downing, Donna**

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**From:** Downing, Donna  
**Sent:** Friday, March 13, 2015 10:24 AM  
**To:** Clovis, Debora; Wendelowski, Karyn  
**Cc:** Flannery-Keith, Erin; Eby, Louis; Horwitz, Sylvia  
**Subject:** RE: Cargill: Greenwire article

I'd consider protecting only the liquid and not the waterbody as failing to restore and maintain the biological integrity of the nation's waters ...

■ Donna

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**From:** Clovis, Debora  
**Sent:** Friday, March 13, 2015 10:12 AM  
**To:** Downing, Donna; Wendelowski, Karyn  
**Cc:** Flannery-Keith, Erin; Eby, Louis; Horwitz, Sylvia  
**Subject:** Cargill: Greenwire article

We are protecting only the liquid in a waterbody, not the waterbody itself? After some of the dust clears on the Clean Water Rule, it would be nice to get your take on the Cargill situation.

## **Greenwire**

### **1. WATER POLICY:**

#### **Salt pond saga raises questions about feds' regulatory reach**

Annie Snider and Debra Kahn, E&E reporters

Published: Thursday, March 12, 2015

*Article updated at 4:16 p.m. EDT.*

FREMONT, Calif. -- The sprawling mud flats, salt ponds, sloughs and marshes at the southern end of San Francisco Bay teem with hundreds of thousands of shorebirds and waterfowl every spring and fall.

The Don Edwards San Francisco Bay National Wildlife Refuge wetlands are a paradise for nature lovers -- but it's not all natural.

Earthen levees tended by a clamshell dredge create a watery maze and serve as a reminder of the bay's historical role as a hub for industrial salt production.

As far back as the 1850s, salt-making operations ruled the edges of the southern bay. Saltworks staked out spots in the marshes and built levees that severed wetlands from the bay, creating networks of industrial ponds.

By the late 1970s, salt production had consolidated from small, scattered operations into one large one ultimately run by international food and commodities goliath Cargill Inc. And conservationists looking to protect dwindling wetlands and revitalize degraded marshes began eyeing old saltworks as restoration opportunities.

Today, former saltworks are home to the West Coast's largest tidal wetlands restoration effort, covering an area the size of Manhattan.

The big win for conservation came in 1972 with the creation of the Don Edwards refuge, one of six in the Bay Area and the nation's first urban wildlife refuge. Another major victory came in 2003 when Sen. Dianne Feinstein (D-Calif.) orchestrated the purchase of 15,100 additional acres of salt ponds in the South Bay, which have gradually been undergoing restoration.

Restoring salt pond to wetland is a relatively low-cost and lowbrow undertaking. Often, all that's needed is to remove a crumbling levee and let bay water return.



Don Edwards San Francisco Bay National Wildlife Refuge – 30,000 acres of restored salt ponds, tidal marsh and mudflats – is one of the country's largest urban refuges. It offers habitat for nine threatened or endangered species and 227 species of birds. Photo by Debra Kahn.

But the saltworks also offer opportunities for developers who see them as potential high-end real estate. And that's how one of two remaining industrial saltworks here became the focus of a pitched battle between environmental groups and residential developers.

What began years ago as a local land-use dispute has exploded into a brawl over the Clean Water Act's regulatory reach.

After years of courtroom battles about federal jurisdiction over the region's salt ponds, the Army Corps of Engineers' top lawyer last year quietly accepted Cargill's argument that the brine in its ponds doesn't meet the definition of "water" under the 1972 law -- a new and controversial legal interpretation.

The regulatory questions have entangled the Army Corps and U.S. EPA, the country's top water regulator, at a critical moment as the Obama administration pushes forward with a contentious rule aimed at clearing up years' of confusion over the Clean Water Act's reach.

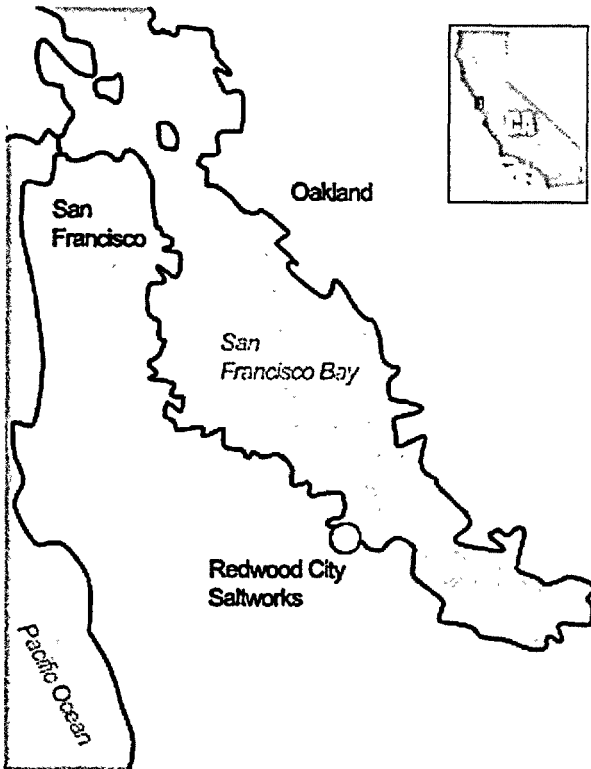
And even as the combatants try to keep the salt pond fight local, what happens here could ripple across the country.

## **'Good times are bad for the bay'**

For years, environmentalists have had their eyes on Cargill's saltworks in the Silicon Valley municipality of Redwood City.

They narrowly missed acquiring the tract in the 2003 deal when the federal funding shrank, but the refuge did receive congressional authorization to add the site's 1,433 acres to its portfolio.

But Cargill has other ideas for that property.



The Redwood City Saltworks is in the heart of Silicon Valley, about 25 miles south of San Francisco. Map by Andrew Holmes.

In 2009, the company and developer DMB Pacific Ventures proposed a mixed-use, high-density development of between 8,000 and 12,000 residences, 200 acres of parks and 400 acres of restored marsh.

There are few U.S. housing markets hotter than Silicon Valley's, and the developers were looking to capitalize. The median sale price for a house in Redwood City is \$1 million, up from \$780,000 in 2010. Facebook Inc. is expanding its Frank Gehry-designed campus just down the road in Menlo Park on a former industrial site adjacent to the bay -- a move likely to drive up housing demand.

"Second only to Manhattan, this is the most out-of-whack, housing-constrained, overpriced [region]," said David Smith, senior vice president for DMB Redwood City Saltworks. "That's why we have stayed so engaged with this site; it is unprecedented in its ability to bring solutions to this area."

Smith maintained the DMB plan had something for everyone. Not only would it bring new housing, it also would provide flood-control benefits for communities, public transportation benefits and a significant wetlands restoration component.

But conservationists weren't convinced.

"Good times are bad for the bay," said Florence LaRiviere, 91, who corralled support for the original 1972 bill that created the refuge and a 1988 bill that doubled the amount of land it could acquire. One of the marshes near the entrance to the refuge, LaRiviere Marsh, bears her name.

Environmental groups saw the development project as a step backward, reversing a 40-year trend of preserving wetlands instead of filling them in. They engaged in a three-year campaign involving direct mail, community polling and getting elected officials from as far as 90 miles away to go on the record opposing the development.

"People in the Bay Area consider an attack on one part of the bay to be an attack on the whole bay," said David Lewis, executive director of the nonprofit Save the Bay.

Amid the controversy, DMB withdrew the plan from consideration by the Redwood City City Council in May 2012, saying it intended to go back to the drawing board and come up with a scaled-down proposal.

The move wasn't purely political.

## 'We didn't think it would be easy'



South San Francisco Bay's tidal marshes were carved up for salt ponds and industrial facilities more than 150 years ago. Today, all but two saltworks sites are in public ownership and in the process of being restored. Landsat satellite image courtesy of the U.S. Geological Survey.

Behind the scenes, Cargill and DMB had spent 2½ years negotiating with the Army Corps and EPA over permitting for the site, which today is used as finishing ponds for making salt.

Developers must get permits from the Army Corps if they want to fill streams, wetlands and ponds covered by the Clean Water Act, as well as permits for affecting navigable waters under the Rivers and Harbors Act.

Those permits can require developers to shrink or redesign their plans to minimize environmental harm. They can also require repairs of damaged streams and wetlands to offset damage caused by development. In some cases, those permit terms can fundamentally alter the financial viability of a project.

Cargill, the Army Corps and environmentalists have been arguing for years over the federal government's authority over the ponds and other complexes at saltworks sites. Between 1971 and 2007, at least 18 lawsuits were filed over the issue.

To understand why this tract was so complicated requires some understanding of salt making.

Salt makers draw bay water into large evaporator ponds, where it sits exposed to the sun and wind. Over time, as the liquid becomes more saline, it gets moved farther through the network of ponds. Then, after about five years, the brine is moved to basins for the final stage of processing, where chunks of sodium chloride are harvested.



The final stages of salt production take place at Cargill's Redwood City site, where heavy equipment scrapes up and moves chunky rock salt after it drops out of the brine. Photo courtesy of Redwood City Saltworks.

The Army Corps' San Francisco District has regularly ruled all of these sites as jurisdictional. Paperwork supporting a series of determinations made in 2007 for former salt ponds that were being restored shows that corps regulators saw the ponds as fitting into three different categories, any one of which would have made them jurisdictional under the agency's regulations.

"This is nothing but bay water running through a series of ponds," said Peter Baye, a former regulator for the San Francisco District who now consults for Save the Bay. He said that water in Cargill's ponds regularly connects with the San Francisco Bay through rainfall and overtopping of the levees.

Cargill, on the other hand, has maintained that the ponds fall outside the scope of the Clean Water Act. The company argues that any wetlands were filled long before the law's passage and that today levees hydrologically separate all the ponds and basins from the bay.

But in the interest of avoiding a protracted battle over the Redwood City site, Cargill and DMB agreed to set aside the question of jurisdiction and negotiate with the corps and EPA in hopes of getting agreement on a permit.

"We came to that table in good faith," DMB's Smith said. "We didn't think it would be easy. We didn't expect to get any kind of pass, but there was enough land and potential on these 1,400 acres to do a project with significant solutions that's fully mitigated and compliant with the Clean Water Act on the site."

But through years of discussion, Smith said progress was hamstrung by unresolved questions about federal jurisdiction.

Three weeks after the developers withdrew their initial plan from the city's consideration in 2012, they asked EPA and the corps for a full, official jurisdictional determination.

Along with that request, DMB and Cargill also submitted a document laying out their case for why the Redwood City site should not be deemed jurisdictional under either the Clean Water Act or the Rivers and Harbors Act.

## How does the CWA define 'water'?

In that document was a footnote that caught the attention of the corps' top lawyer, Earl Stockdale.

That note states that by the time that brine is transported to the Redwood City site, following years of treatment, the liquid is actually considered a pollutant under a separate section of the Clean Water Act.

## Key court rulings

- *Leslie Salt Co. v. Froehlke*, 1973 -- The San Francisco-based 9th U.S. Circuit Court of Appeals ruled against Leslie Salt's challenge to federal jurisdiction over its diked evaporator ponds, arguing that if San Francisco Bay water warranted protection outside Leslie's floodgates, it still warranted protection after passing through them.
- *Cargill Inc. v. United States*, 1995 -- A Northern California federal judge ultimately ruled that shallow, out-of-production basins once used to crystallize salt were jurisdictional because migratory birds landed in the rainwater that ponded there. The Supreme Court declined to take up Cargill's appeal, but Justice Clarence Thomas wrote a dissent raising doubts about the agencies' so-called Migratory Bird Rule.
- *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 2001 -- The Supreme Court ruled in a 5-4 decision that the presence of migratory birds was not, in itself, enough to rule a water jurisdictional under the Clean Water Act.
- *Rapanos v. United States*, 2006 -- The Supreme Court ruled 5-4 against the Army Corps' broad approach to claiming jurisdiction, but Justice Anthony Kennedy, who joined the majority, set his own test for jurisdiction in a stand-alone opinion. The case set off a cascade of jurisdictional confusion (*Greenwire*, Feb. 7, 2011).
- *San Francisco Baykeeper v. Cargill*, 2007 -- The 9th Circuit ruled that a heavily saline waste pond nestled inside a wildlife refuges fell outside federal jurisdiction because the migratory bird connection was no longer sufficient and the Army Corps' regulations only named adjacent wetlands as jurisdictional and not other adjacent waters like ponds.

-- Annie Snider

The Redwood City site's crystalizer ponds are home to the final phases of salt production where chunks of salt drop out of the brine. After this "precipitation," the remaining liquid is moved away, and heavy bulldozers and other equipment come in to scrape and move the salt.

In a January 2014 legal guidance memo, Stockdale, then the corps' chief counsel, wrote that liquids at the Redwood City site raise a fundamental question: "What kind of liquids constitute 'water' as that term would be understood by the majority of the Supreme Court?"

Stockdale, who retired at the end of 2014, acknowledged that the term "water" within the Clean Water Act must be broader than just H<sub>2</sub>O. The law was presumably intended to cover the Cuyahoga River, whose burning in 1969 brought a groundswell of public concern that led to the law's passage, even though that river clearly was "not a pure, unadulterated water," he wrote.

Still, Stockdale argued that the liquids at the Redwood City site don't meet the definition.

"Other than being in an aqueous form and being originally derived from Bay waters, the liquids on the Redwood City site are more commonly understood to be a chemical used in, or a byproduct of, an industrial process," he wrote.

The liquids there are "chemically distinguishable, ecologically distinguishable, and legally distinguishable from the Bay waters," he concluded. "They are no longer the type of resource the CWA was intended to protect."

Other legal questions about an interstate commerce connection or the site's significance to downstream waters are consequently irrelevant, he wrote, concluding that the Redwood City basins are not jurisdictional.

But whose opinion, other than Stockdale's, the memo reflects is unclear.

Army Corps spokesman Gene Pawlik said the legal guidance was prepared by Stockdale in coordination with the agency's regulatory and technical experts and that the corps has no plans to withdraw it.

EPA, which has ultimate oversight over Clean Water Act issues and was engaged with the Redwood City determination from the start, wasn't part of the development of the legal memo, its regional office said.

Moreover, the memo was never put out for public notice and comment. For a guidance memo like this one, public comment is not required by law, but federal agencies typically see it as good practice when there's significant public interest in an issue.

All this angers environmentalists.

"Cargill basically wrote this for the corps," Save the Bay's Lewis said. "The corps counsel basically took it, and the process doesn't appear to have created an opportunity for other legal opinions to be factored in."

The Army Corps stresses that its memo is tailored to a specific site and the legal opinions pertaining to one area aren't necessarily applicable to other sites.

But Jan Goldman-Carter, a veteran water lawyer at the National Wildlife Federation, said she had never seen the question of what kind of liquid constitutes a water under the Clean Water Act raised before. She called Stockdale's legal arguments "a real stretch" and "pulled out of the air," unsupported by case law or other legal precedent.

Goldman-Carter suggested that Stockdale's argument that waters initially covered by the Clean Water Act can be turned into uncovered waters through industrial intervention fundamentally misunderstands the 1972 law.

"That is the whole point of the Clean Water Act -- to maintain and restore and stop pollutants from harming aquatic sites 'originally derived from Bay waters,'" she said by email.

"Extending this logic, wetlands and ponds and other diked areas can be contaminated with chemicals and then found nonjurisdictional as the consequence of 'a purposeful industrial process to create a product.'"

## **'Special case list'**

After two years of waiting, Smith, at DMB, said he received word last spring that his final jurisdictional determination would be ready on May 16, 2014.

The day before it was due out, he called the corps to make arrangements to pick up the documents.

"I called on the 15th and said, 'I don't mean to be a pain, but I already am, so can I please send a messenger to pick it up whenever appropriate?'" Smith recounted. "They said, 'Funny you should be calling right now.'"

The day before, May 14, EPA Region 9 Administrator Jared Blumenfeld in San Francisco had moved to have his agency take over the jurisdictional determination.

A 1989 memorandum of agreement between EPA and the corps lays out the process by which EPA can move to take over determinations about federal authority on individual sites, entire regions or particular activities.

In instances where EPA wants to make the jurisdiction call, the regional administrator asks EPA headquarters in Washington, D.C., to add it to the "special case list."

That's what Blumenfeld did. But EPA headquarters didn't approve the special case request at that time.

Instead, the top corps official -- Assistant Secretary of the Army for Civil Works Jo-Ellen Darcy -- undertook her own review of the case.

Ironically, DMB and Cargill had asked from the beginning for EPA to be the lead on the jurisdictional determination.

"We knew that EPA could have a role if they chose to," Smith said. "So we addressed it jointly to the corps and EPA from day one and asked EPA to be a part of it."

Region 9 declined to take the reins in 2012, according to an email from the head of the regional wetlands office sent to Smith and others.

But EPA agreed it had a role and committed to "providing timely input" to the corps on the determination.

## Feinstein weighs in

Now, with Darcy's review finished and the Army Corps' headquarters office working toward a final decision "in the near future," opposition to the development project is again flaring.

"I'm very concerned about this," Feinstein, the top Democrat on the Senate Appropriations subcommittee that oversees the corps' budget, said at a hearing with Darcy and other corps leaders last month. "What makes our whole area is the bay, and we do not want it filled in."

Feinstein, whose work on the salt ponds dates back to her time as San Francisco mayor in the late 1970s and 1980s and who called herself "the mother of the whole salt pond situation," is tracking the issue closely, her office said.

To be sure, even if the ponds are ruled nonjurisdictional, there are several more layers of government for the developers to get through, including the Regional Water Resources Control Board, the Bay Conservation and Development Commission and Redwood City itself.

But regardless of those hurdles, a finding of no Clean Water Act jurisdiction would likely have big implications for the property's value.

"When they finally get through those or don't get through those, they're going to know a lot more about what the value of the land is and whether it's worth more than the value of farming salt on it," said Rick Knauf, executive managing director of real estate developer Colliers International's Redwood City office who is not involved with the Cargill and DMB project. "I think with this kind of a project, you just have to get over one hurdle at a time."

Meanwhile, California Democrats in the House are raising concerns over the corps' legal memo.

"The Environmental Protection Agency (EPA) is a co-regulatory partner in the Clean Water Act implementation, and needs to be fully consulted in the process of developing policy and legal interpretations of the Clean Water Act Section 404, under which the Corps regulation of the Cargill site would fall," 11 House members from the region wrote in a letter to Darcy last month.

The option of EPA taking over the decision on the Redwood City site is still on the table, the corps spokesman confirmed.

But the politics aren't easy. EPA and the Army Corps are in the midst of a fierce battle with congressional Republicans and some powerful industry groups over a proposed rule aimed at clearing up years of confusion over the scope of the Clean Water Act following two muddled Supreme Court decisions.

Critics of the rule proposal have been quick to point out that EPA has been the face of the effort and raise questions about the corps' buy-in.

A move by EPA now to take over the case and rule the Redwood City salt ponds jurisdictional when the corps' legal analysis states that they are not would likely stoke opponents' allegations of an EPA power grab.

And if either agency were to rule the Cargill site jurisdictional, the corps' legal guidance could also provide ammunition in a lawsuit by the developers.

Add to that the general bureaucratic tendency for agencies to hunker down and protect their own interests.

But DMB's Smith said he's not convinced that the current flurry of activity means a decision is at hand.

"We've been hoping it was imminent for two years now," he said. "We are repeatedly asked to remain patient."

## **Downing, Donna**

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**From:** Downing, Donna  
**Sent:** Thursday, March 12, 2015 2:57 PM  
**To:** Kaiser, Russell; Goodin, John; Christensen, Damaris; Rose Kwok; Schaller, Andrea; Evalenko, Sandy; Best-Wong, Benita  
**Subject:** FYI -- Article posted today on Cargill / Redwood City site

FYI --

Here's an E&E article posted today on the Cargill site. It's got considerably more background than the usual E&E article. The article discusses the Stockdale analysis as supporting the Cargill jurisdictional position. ...

Donna

## **WATER POLICY:**

### **Salt pond saga raises questions about feds' regulatory reach**

Annie Snider and Debra Kahn, E&E reporters

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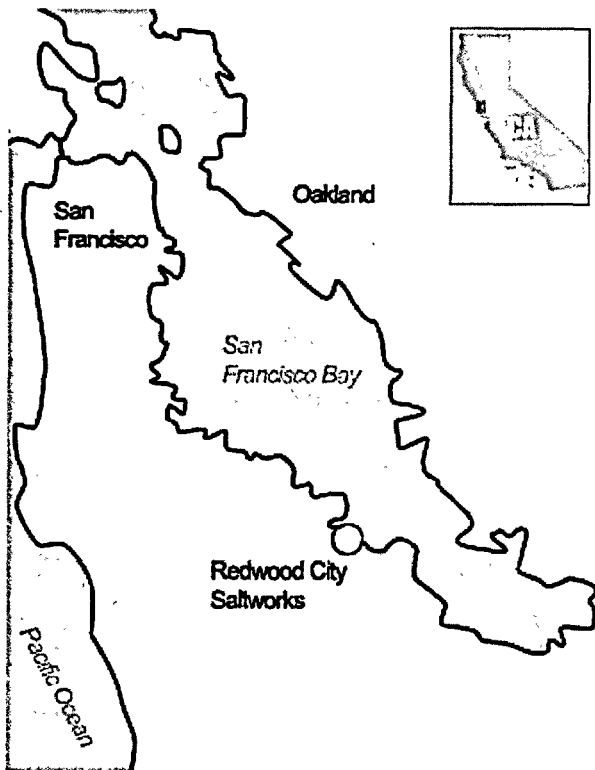
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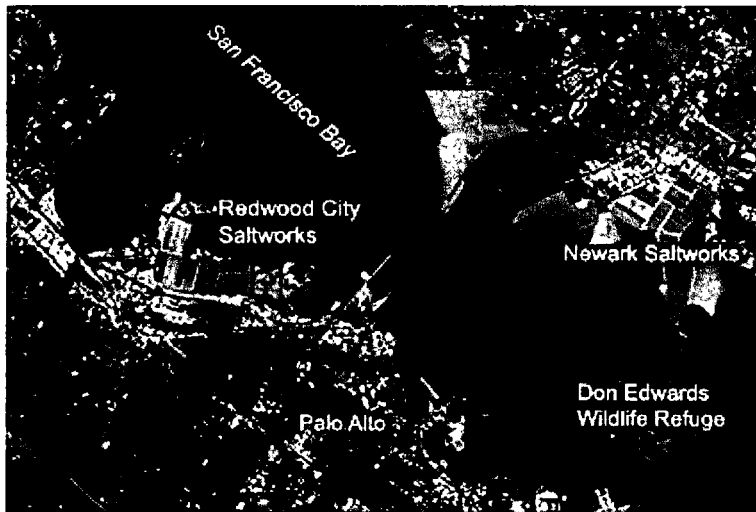
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But through years of discussion, Smith said progress was hamstrung by unresolved questions about federal jurisdiction.

Three weeks after the developers withdrew their initial plan from the city's consideration in 2012, they asked EPA and the corps for a full, official jurisdictional determination.

Along with that request, DMB and Cargill also submitted a document laying out their case for why the Redwood City site should not be deemed jurisdictional under either the Clean Water Act or the Rivers and Harbors Act.

## How does the CWA define 'water'?

In that document was a footnote that caught the attention of the corps' top lawyer, Earl Stockdale.

That note states that by the time that brine is transported to the Redwood City site, following years of treatment, the liquid is actually considered a pollutant under a separate section of the Clean Water Act.

## Key court rulings

- *Leslie Salt Co. v. Froehlke*, 1973 – The San Francisco-based 9th U.S. Circuit Court of Appeals ruled against Leslie Salt's challenge to federal jurisdiction over its diked evaporator ponds, arguing that if San Francisco Bay water warranted protection outside Leslie's floodgates, it still warranted protection after passing through them.
- *Cargill Inc. v. United States*, 1995 – A Northern California federal judge ultimately ruled that shallow, out-of-production basins once used to crystallize salt were jurisdictional because migratory birds landed in the rainwater that ponded there. The Supreme Court declined to take up Cargill's appeal, but Justice Clarence Thomas wrote a dissent raising doubts about the agencies' so-called Migratory Bird Rule.
- *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 2001 -- The Supreme Court ruled in a 5-4 decision that the presence of migratory birds was not, in itself, enough to rule a water jurisdictional under the Clean Water Act.
- *Rapanos v. United States*, 2006 -- The Supreme Court ruled 5-4 against the Army Corps' broad approach to claiming jurisdiction, but Justice Anthony Kennedy, who joined the majority, set his own test for jurisdiction in a stand-alone opinion. The case set off a cascade of jurisdictional confusion (*Greenwire*, Feb. 7, 2011).
- *San Francisco Baykeeper v. Cargill*, 2007 -- The 9th Circuit ruled that a heavily saline waste pond nestled inside a wildlife refuges fell outside federal jurisdiction because the migratory bird connection was no longer sufficient and the Army Corps' regulations only named adjacent wetlands as jurisdictional and not other adjacent waters like ponds.

-- Annie Snider

The Redwood City site's crystalizer ponds are home to the final phases of salt production where chunks of salt drop out of the brine. After this "precipitation," the remaining liquid is moved away, and heavy bulldozers and other equipment come in to scrape and move the salt.

In a January 2014 legal guidance memo, Stockdale, then the corps' chief counsel, wrote that liquids at the Redwood City site raise a fundamental question: "What kind of liquids constitute 'water' as that term would be understood by the majority of the Supreme Court?"

Stockdale, who retired at the end of 2014, acknowledged that the term "water" within the Clean Water Act must be broader than just H<sub>2</sub>O. The law was presumably intended to cover the Cuyahoga River, whose burning in 1969 brought a groundswell of public concern that led to the law's passage, even though that river clearly was "not a pure, unadulterated water," he wrote.

Still, Stockdale argued that the liquids at the Redwood City site don't meet the definition.

"Other than being in an aqueous form and being originally derived from Bay waters, the liquids on the Redwood City site are more commonly understood to be a chemical used in, or a byproduct of, an industrial process," he wrote.

The liquids there are "chemically distinguishable, ecologically distinguishable, and legally distinguishable from the Bay waters," he concluded. "They are no longer the type of resource the CWA was intended to protect."

Other legal questions about an interstate commerce connection or the site's significance to downstream waters are consequently irrelevant, he wrote, concluding that the Redwood City basins are not jurisdictional.

But whose opinion, other than Stockdale's, the memo reflects is unclear.

Army Corps spokesman Gene Pawlik said the legal guidance was prepared by Stockdale in coordination with the agency's regulatory and technical experts and that the corps has no plans to withdraw it.

EPA, which has ultimate oversight over Clean Water Act issues and was engaged with the Redwood City determination from the start, wasn't part of the development of the legal memo, its regional office said.

Moreover, the memo was never put out for public notice and comment. For a guidance memo like this one, public comment is not required by law, but federal agencies typically see it as good practice when there's significant public interest in an issue.

All this angers environmentalists.

"Cargill basically wrote this for the corps," Save the Bay's Lewis said. "The corps counsel basically took it, and the process doesn't appear to have created an opportunity for other legal opinions to be factored in."

The Army Corps stresses that its memo is tailored to a specific site and the legal opinions pertaining to one area aren't necessarily applicable to other sites.

But Jan Goldman-Carter, a veteran water lawyer at the National Wildlife Federation, said she had never seen the question of what kind of liquid constitutes a water under the Clean Water Act raised before. She called Stockdale's legal arguments "a real stretch" and "pulled out of the air," unsupported by case law or other legal precedent.

Goldman-Carter suggested that Stockdale's argument that waters initially covered by the Clean Water Act can be turned into uncovered waters through industrial intervention fundamentally misunderstands the 1972 law.

"That is the whole point of the Clean Water Act -- to maintain and restore and stop pollutants from harming aquatic sites 'originally derived from Bay waters,'" she said by email.

"Extending this logic, wetlands and ponds and other diked areas can be contaminated with chemicals and then found nonjurisdictional as the consequence of 'a purposeful industrial process to create a product.'"

## **'Special case list'**

After two years of waiting, Smith, at DMB, said he received word last spring that his final jurisdictional determination would be ready on May 16, 2014.

The day before it was due out, he called the corps to make arrangements to pick up the documents.

"I called on the 15th and said, 'I don't mean to be a pain, but I already am, so can I please send a messenger to pick it up whenever appropriate?'" Smith recounted. "They said, 'Funny you should be calling right now.'"

The day before, May 14, EPA Region 9 Administrator Jared Blumenfeld in San Francisco had moved to have his agency take over the jurisdictional determination.

A 1989 memorandum of agreement between EPA and the corps lays out the process by which EPA can move to take over determinations about federal authority on individual sites, entire regions or particular activities.

In instances where EPA wants to make the jurisdiction call, the regional administrator asks EPA headquarters in Washington, D.C., to add it to the "special case list."

That's what Blumenfeld did. But EPA headquarters didn't approve the special case request at that time.

Instead, the top corps official -- Assistant Secretary of the Army for Civil Works Jo-Ellen Darcy -- undertook her own review of the case.

Ironically, DMB and Cargill had asked from the beginning for EPA to be the lead on the jurisdictional determination.

"We knew that EPA could have a role if they chose to," Smith said. "So we addressed it jointly to the corps and EPA from day one and asked EPA to be a part of it."

Region 9 declined to take the reins in 2012, according to an email from the head of the regional wetlands office sent to Smith and others.

But EPA agreed it had a role and committed to "providing timely input" to the corps on the determination.

## **Feinstein weighs in**

Now, with Darcy's review finished and the Army Corps' headquarters office working toward a final decision "in the near future," opposition to the development project is again flaring.

"I'm very concerned about this," Feinstein, the top Democrat on the Senate Appropriations subcommittee that oversees the corps' budget, said at a hearing with Darcy and other corps leaders last month. "What makes our whole area is the bay, and we do not want it filled in."

Feinstein, whose work on the salt ponds dates back to her time as San Francisco mayor in the late 1970s and 1980s and who called herself "the mother of the whole salt pond situation," is tracking the issue closely, her office said.

To be sure, even if the ponds are ruled nonjurisdictional, there are several more layers of government for the developers to get through, including the Regional Water Resources Control Board, the Bay Conservation and Development Commission and Redwood City itself.

But regardless of those hurdles, a finding of no Clean Water Act jurisdiction would likely have big implications for the property's value.

"When they finally get through those or don't get through those, they're going to know a lot more about what the value of the land is and whether it's worth more than the value of farming salt on it," said Rick Knauf, executive managing director of real estate developer Colliers International's Redwood City office who is not involved with the Cargill and DMB project. "I think with this kind of a project, you just have to get over one hurdle at a time."

Meanwhile, California Democrats in the House are raising concerns over the corps' legal memo.

"The Environmental Protection Agency (EPA) is a co-regulatory partner in the Clean Water Act implementation, and needs to be fully consulted in the process of developing policy and legal interpretations of the Clean Water Act Section 404, under which the Corps regulation of the Cargill site would fall," 11 House members from the region wrote in a letter to Darcy last month.

The option of EPA taking over the decision on the Redwood City site is still on the table, the corps spokesman confirmed.

But the politics aren't easy. EPA and the Army Corps are in the midst of a fierce battle with congressional Republicans and some powerful industry groups over a proposed rule aimed at clearing up years of confusion over the scope of the Clean Water Act following two muddled Supreme Court decisions.

Critics of the rule proposal have been quick to point out that EPA has been the face of the effort and raise questions about the corps' buy-in.

A move by EPA now to take over the case and rule the Redwood City salt ponds jurisdictional when the corps' legal analysis states that they are not would likely stoke opponents' allegations of an EPA power grab.

And if either agency were to rule the Cargill site jurisdictional, the corps' legal guidance could also provide ammunition in a lawsuit by the developers.

Add to that the general bureaucratic tendency for agencies to hunker down and protect their own interests.

But DMB's Smith said he's not convinced that the current flurry of activity means a decision is at hand.

"We've been hoping it was imminent for two years now," he said. "We are repeatedly asked to remain patient."

## Downing, Donna

---

**From:** Downing, Donna  
**Sent:** Wednesday, March 11, 2015 5:18 PM  
**To:** Eisenberg, Mindy; Miller, Clay; Landers, Timothy; Topping, Brian  
**Cc:** Kaiser, Russell  
**Subject:** RE: ACTION: Follow-up Requested by Ken for T&I Hearing

I checked with Russ about the Cargill special case, and his recollection is the same as mine -- We participated in the verbal discussions that arose after SF District suggested Region 9 special case the Cargill site, but did not get any resulting special case request in writing. Russ thinks that Greg or Gautam would have the written request and response, if there are ones. I believe Region 9's ultimate decision was to not treat this as a special case but instead offer ongoing technical assistance to the Corps.

Donna

---

**From:** Eisenberg, Mindy  
**Sent:** Wednesday, March 11, 2015 3:47 PM  
**To:** Miller, Clay; Landers, Timothy; Topping, Brian; Downing, Donna  
**Cc:** Kaiser, Russell  
**Subject:** FW: ACTION: Follow-up Requested by Ken for T&I Hearing

Clay/Tim/Brian – Please see Ken's request below. Do we have this information easily accessible?

Donna – do you by chance have the Cargill special case request? Was there a Nancy response?

Thanks all!!

Mindy Eisenberg  
Associate Director, Wetlands Division  
Office of Wetlands, Oceans and Watersheds  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW, mailcode 4502T  
Washington, DC 20460  
(202) 566-1290  
[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

---

**From:** Moore, Kristie  
**Sent:** Wednesday, March 11, 2015 2:35 PM  
**To:** Eisenberg, Mindy; Goodin, John; Kaiser, Russell; Brown, Sineta  
**Cc:** Brown, Robert; Chancey, Barbara; Topping, Brian  
**Subject:** ACTION: Follow-up Requested by Ken for T&I Hearing

Wetlands,

We briefed Ken today to prepare for next week's T&I hearing on the FY16 Budget. He asked that we provide him with some additional information. I need your help responding to some of his requests. We need to get material to OW by early Friday afternoon so Ken can review over the weekend.

Can you please try to get me this additional information **by COB, tomorrow or 10:00 a.m. Friday morning at the latest?** I need time to get Dave/Benita's review before I send it to OW.

**MTM:**

- Number of permits issued during the Obama Administration? Can we compare to other Administrations?
- How many miles of streams have been filled?

For the number of permits issued, we'd have to get that from the Corps – right? Is that possible by Friday? If not, can we talk about the # of permits reviewed? # of permits reviewed in a timely manner? How far can we go back? 2012ish?

Benita thought we should add the information to the attached Q&A. She also wanted to pull in a few bullets from the 404 Reporting Q&A into the background of the mining Q&A. I've already included those bullets in the attached.

**Cargill Salt Ponds:**

Ken would like a copy of the special request from Region 9 and Nancy's response.

Thank you in advance for your quick response.

Kristie

Kristie M. Moore  
Office of Wetlands Oceans and Watersheds  
U.S. Environmental Protection Agency  
EPA West  
1200 Pennsylvania Ave., NW  
MC-4501 T  
Washington, DC, 20460  
office: (202) 566-1616  
fax: (202) 566-1544

## Downing, Donna

---

**From:** Evans, David  
**Sent:** Tuesday, February 24, 2015 11:55 AM  
**To:** Goodin, John; Kaiser, Russell; Downing, Donna  
**Subject:** FW: Greenwire inquiry re: Redwood City Saltworks jurisdictional determination

Fyi

Sent from my Windows Phone

---

**From:** Loop, Travis  
**Sent:** 2/24/2015 10:14 AM  
**To:** Kopocis, Ken; Peck, Gregory; Brubaker, Sonia; Evans, David  
**Subject:** FW: Greenwire inquiry re: Redwood City Saltworks jurisdictional determination

What would OW's input be on this Cargill inquiry? We could wait to see R9's proposed response and provide edits.

Travis Loop  
Director of Communications  
Office of Water  
U.S. Environmental Protection Agency  
202-870-6922  
[loop.travis@epa.gov](mailto:loop.travis@epa.gov)

---

**From:** Skadowski, Suzanne  
**Sent:** Monday, February 23, 2015 8:33 PM  
**To:** Loop, Travis  
**Cc:** Daguillard, Robert  
**Subject:** Greenwire inquiry re: Redwood City Saltworks jurisdictional determination

Hi Travis,

Heads up on this Greenwire inquiry on the Cargill Salt Ponds (aka Redwood City Saltworks). We sent a brief desk statement to a different Greenwire reporter last week (and to a local paper, who ran this story), but now they're digging deeper with more detailed questions for us. We're planning our response now, but welcome your input also. Thank you.

---

Suzanne Skadowski  
Public Affairs Specialist  
U.S. Environmental Protection Agency | San Francisco  
D: 415-972-3165 | C: 415-265-2863 | E: [skadowski.suzanne@epa.gov](mailto:skadowski.suzanne@epa.gov)

---

**From:** Skadowski, Suzanne  
**Sent:** Monday, February 23, 2015 5:18 PM  
**To:** 'Annie Snider'  
**Subject:** RE: Redwood City Saltworks jurisdictional determination

Hi Annie,

Thanks for the call and for sending your detailed questions. I'll check with our program staff here and try to get a response to you tomorrow.

---

Suzanne Skadowski  
Public Affairs Specialist  
U.S. Environmental Protection Agency | San Francisco  
D: 415-972-3165 | C: 415-265-2863 | E: [skadowski.suzanne@epa.gov](mailto:skadowski.suzanne@epa.gov)

---

**From:** Annie Snider [<mailto:asnider@eenews.net>]  
**Sent:** Monday, February 23, 2015 4:39 PM  
**To:** Skadowski, Suzanne  
**Subject:** RE: Redwood City Saltworks jurisdictional determination

Hi Suzanne, thanks for taking the time to talk earlier today. Here's the list of things I ran through with you -- let me know if any of these don't make sense or if more explanation would help:

-In its May 2012 letter requesting a final JD for the salt plant, Redwood City Saltworks specifically asked that EPA make the jurisdictional determination. Why was this request denied? Was it considered?

-Last summer the News Record reported on a May 14, 2014 memo by Jared Blumenfeld that the paper says included a request that the Redwood City JD be put on a special case list, and alludes to an interview with the administrator in which he said the JD was not put on that list.

[http://www.mercurynews.com/peninsula/ci\\_26346721/federal-agencies-wrestle-over-whether-saltworks-property-should](http://www.mercurynews.com/peninsula/ci_26346721/federal-agencies-wrestle-over-whether-saltworks-property-should)  
Does EPA dispute any of these facts? I am still trying to track down that memo - if you could share it that would be great.

-My understanding is that Administrator McCarthy would have to sign off on it in order for a case to be added to the special case list. Was such a request for the Redwood City JD submitted by Region 9 to EPA headquarters?

-Is Blumenfeld considering making a special case request in the future?

-Did EPA review or weigh in on the corps' legal guidance pertaining to the Redwood City JD that was sent by the corps' director of civil works, Steve Stockton, to the commander of the San Francisco district on Jan. 15, 2014? Had EPA seen it before it was sent?

-Many wetlands/Clean Water Act experts watching this case speculate that EPA is being less assertive in this case than it might be otherwise because of the ongoing politics around the proposed Waters of the U.S. regulation. I wanted to give y'all a heads up that that's part of what I'm looking at in this story and give you a chance to respond.

Like I said, we're shooting to wrap up reporting by COB tomorrow. It's possible that things will get pushed back; if they do I will let you know. If possible, I would love to get a few minutes to talk with the regional administrator about these issues. Failing that, I want to make sure that I've got all the facts straight and have given everyone a fair chance to respond.

I'll be in the office until about 12:30 eastern tomorrow, and then on my cell after (646-250-1943), although I'll be at a conference, so it may take me a minute to pick up if I need to step out.

thanks,  
Annie

---

**From:** Annie Snider  
**Sent:** Monday, February 23, 2015 4:50 PM  
**To:** Zito, Kelly; Skadowski, Suzanne  
**Subject:** RE: Redwood City Saltworks jurisdictional determination

Thanks, Kelly.

Suzanne -- I just left you a message. I'm at my desk (202-446-0411) for another 25 min or so if you have time to talk now, or let's try to find a time to touch base tomorrow.

Best,  
Annie

---

**From:** Zito, Kelly [<mailto:ZITO.KELLY@EPA.GOV>]  
**Sent:** Monday, February 23, 2015 4:44 PM  
**To:** Annie Snider; Skadowski, Suzanne  
**Subject:** RE: Redwood City Saltworks jurisdictional determination

Hi Annie –

Thanks so much for your query. I just forwarded your message to Suzanne Skadowski, our press officer for all things Northern California.

I've also cc'd her here. Additionally, her direct number is 415-972-3165.

Best-  
Kelly

---

**From:** Annie Snider [<mailto:asnider@eenews.net>]  
**Sent:** Monday, February 23, 2015 1:27 PM  
**To:** Zito, Kelly  
**Subject:** Redwood City Saltworks jurisdictional determination

Kelly, I just left you a voice mail – I'm our DC-based water reporter, helping Debra Kahn look into this issue. I know she got a statement from you last week about the state-of-play on the JD, but I wanted to find some time to chat with you about some of what I'm reading in the local press and hearing from others on the ground. I want to be sure we don't print something that is incorrect.

I'll be at my desk for another 45 min or so. Tomorrow I'll be running around, so if we don't connect today, let's touch base by email tomorrow and find a time when we can talk.

Best,  
Annie

**Annie Snider**  
Reporter  
[asnider@eenews.net](mailto:asnider@eenews.net)  
202-446-0411 (p)  
202-737-5299 (f)

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## **Downing, Donna**

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**From:** Evans, David  
**Sent:** Friday, February 13, 2015 2:45 PM  
**To:** Kopocis, Ken; Peck, Gregory; Gilinsky, Ellen; Best-Wong, Benita; Goodin, John; Kaiser, Russell; Downing, Donna; Klasen, Matthew; Borum, Denis  
**Subject:** Congressional Letter on Cargill/Redwood City  
**Attachments:** 2015-02-12 Darcy USACE CWA JD.pdf

Wanted to make sure you had copy of this latest (Congressional) correspondence on Redwood City – letter from 11 Cal. Congressional reps to Jo Ellen.

Dave

**Congress of the United States**  
**Washington, DC 20515**

February 12, 2015

The Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army for Civil Works  
108 Army Pentagon  
Washington, DC 20310-0108

Dear Secretary Darcy:

It has come to our attention that the U.S. Army Corps of Engineers ("Corps") is considering relinquishing federal Clean Water Act and Rivers and Harbors Act jurisdiction over the Redwood City Salt Plant site in Redwood City, California. We are concerned that this decision is being made without full consideration of the consequences for San Francisco Bay and the nation, and without appropriate consultation, due process, and consideration of the Corps' own previous determinations.

We are writing to urge the Corps to comply with the law. The Environmental Protection Agency (EPA) is a co-regulatory partner in the Clean Water Act implementation, and needs to be fully consulted during the process of developing policy and legal interpretations of the Clean Water Act Section 404, under which the Corps regulation of the Cargill site would fall. Any novel, unilateral re-interpretation of the Clean Water Act must not be created in secret, without opportunity for public input, formal consultation with the EPA, or Congressional approval.

We also urge the Corps to be consistent in its interpretation of statute. The Corps has previously indicated in a 2010 Preliminary Jurisdictional Determination (attached) that the Redwood City Salt Plant salt ponds are indeed Waters of the United States under the Clean Water Act and within the jurisdiction of the Rivers and Harbors Act. The Corps also determined in 2008 that the nearly-identical Napa Plant salt ponds just 50 miles north also fall under Clean Water Act and Rivers and Harbors Act jurisdiction. It would be remarkable for these precedents to not be given full consideration by the Corps in its upcoming Jurisdictional Determination.

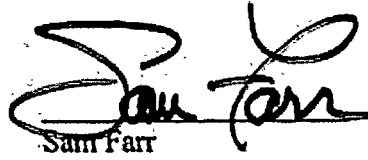
Any major re-interpretations of the Clean Water Act must not occur without full public input and consultation between the Corps and EPA. We strongly urge the Corps to comply with the law in a consistent, transparent, and fair fashion.

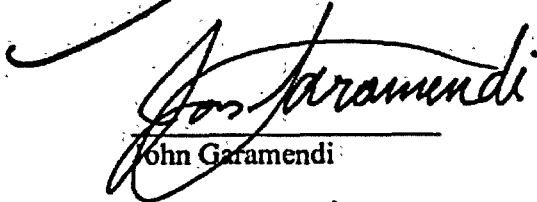
Sincerely,

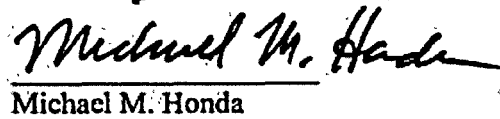
  
Jackie Speier

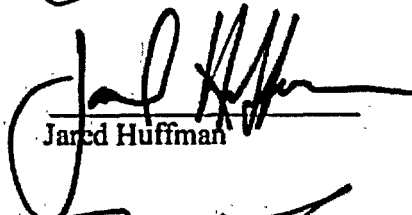
  
Mark DeSaulnier

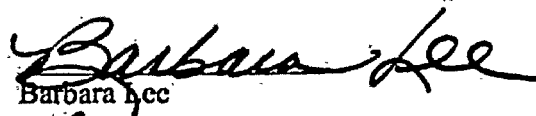
  
Anna G. Eshoo

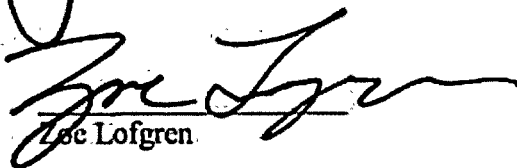
  
Sam Farr

  
John Garamendi

  
Michael M. Honda

  
Jared Huffman

  
Barbara Lee

  
Zoe Lofgren

  
Eric Swalwell

  
Mike Thompson

cc:

The Honorable John McHugh, Secretary, U.S. Army  
The Honorable Gina McCarthy, U.S. EPA  
Mr. Michael Boots, White House Council on Environmental Quality



**DEPARTMENT OF THE ARMY**  
**SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS**  
**1465 MARKET STREET**  
**SAN FRANCISCO, CALIFORNIA 94103-1398**

**APR 14 2010**

Regulatory Division

SUBJECT: File Number 26726S

Mr. David Smith  
DMB Associates, Inc.  
DMB Redwood City Salt Works  
1700 Seaport Boulevard, Suite 200  
Redwood City, California 94603

Dear Mr. Smith:

This letter is written in response to your initial submittal of November 12, 2009, and revised submittal of January 26, 2010, requesting a preliminary jurisdictional determination of the extent of areas that may be waters of the U.S. at your project site, the Redwood City salt production facilities and adjacent areas located north of US 101 and east of Seaport Boulevard in the City of Redwood City, San Mateo County, California.

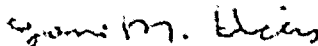
Enclosed are maps showing the extent and location of waters and wetlands, entitled "USACE File # 26726S, Preliminary Jurisdictional Determination, DMB Redwood City Saltworks" in four sheets, dated February, 22, 2010. We have based this preliminary jurisdictional determination on the current conditions on the site as verified during a site visit performed by our staff on December 17, 2009. A change in those conditions may also change the extent of waters and wetlands that may be subject to our regulatory jurisdiction under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. This preliminary jurisdictional determination issued pursuant to the Regulatory Guidance Letter, RGL 08-02, can be used only to determine that wetlands or other water bodies that exist on your project site may be jurisdictional waters of the United States under Section 404 of the Clean Water Act (33 U.S.C. Section 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. Section 403). The findings of this preliminary jurisdictional determination will be used to process an application for a Department of the Army permit to install structures or conduct work in navigable waters of the United States and/or discharge dredged or fill material into waters of the United States.

For purposes of computations of impacts, compensatory mitigation requirements and other resource protection measures, a permit decision made on the basis of a preliminary jurisdictional determination will treat all waters and wetlands on the site as if they are jurisdictional waters. Application for Corps authorization should be made to this office using the application form in the enclosed pamphlet. To avoid delays it is essential that you enter the file number at the top of

this letter into Item No. 1 of the application. The application must include plans showing the location, extent and character of the proposed activity, prepared in accordance with the requirements contained in this pamphlet. You are advised that preliminary jurisdictional determinations may not be appealed (see 33 C.F.R. Section 331.5(b)(9)). However, you may request an approved jurisdictional determination, which may be appealed, that precisely identifies the limits of Corps jurisdiction subject to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. You may also provide new information for further consideration by the Corps to reevaluate this preliminary jurisdictional determination.

Should you have any questions regarding this matter, please call Katerina Galacatos of our Regulatory Division at 415-503-6778. Please address all correspondence to the Regulatory Division and refer to the File Number at the head of this letter. If you would like to provide comments on our permit review process, please complete the Customer Survey Form available online at <http://per2.nwp.usace.army.mil/survey.html>.

Sincerely,

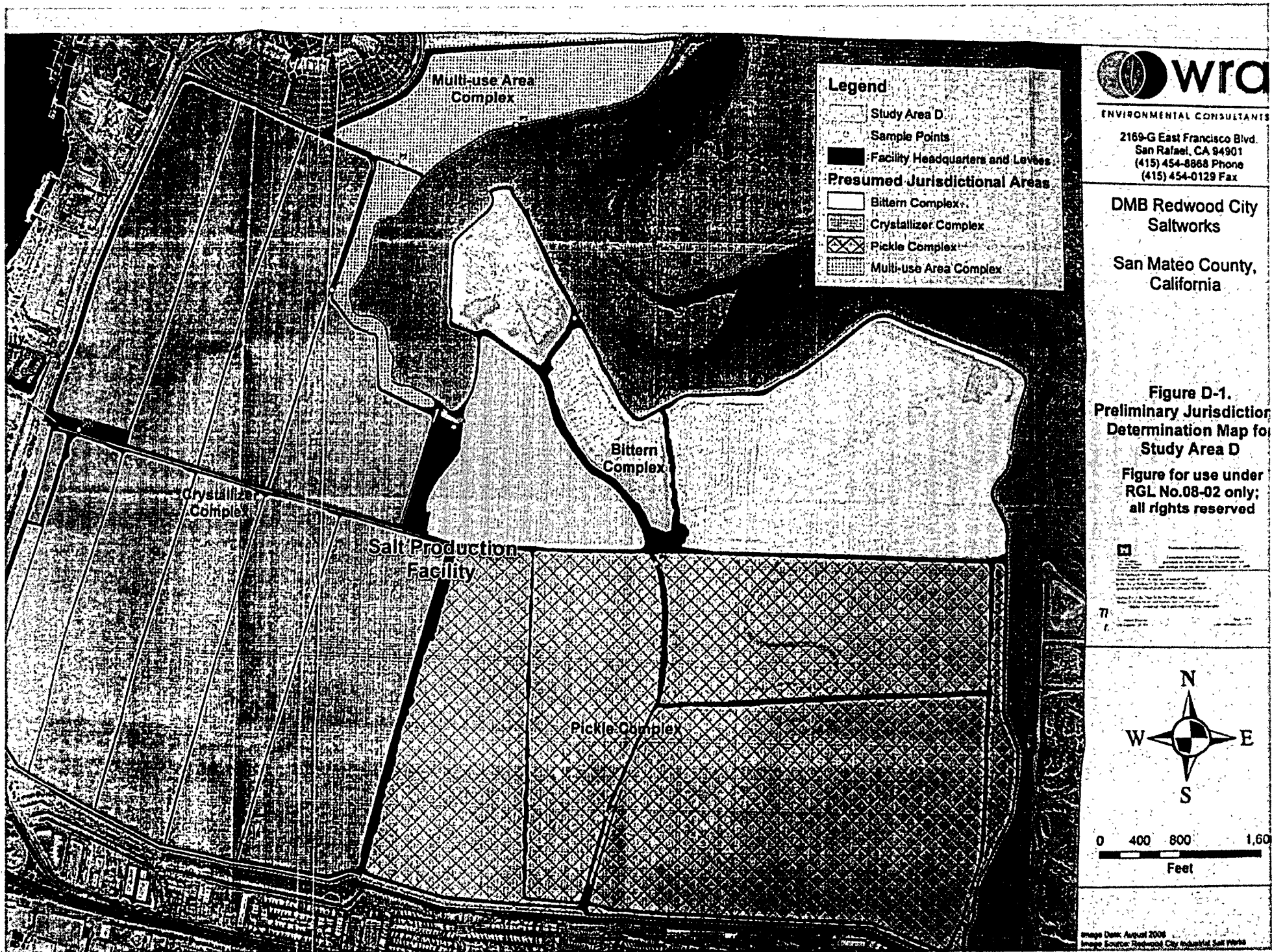


Jane M. Hicks  
Chief, Regulatory Division

Enclosures

Copies Furnished without enclosures:

CA RWQCB, Oakland, CA  
CA SWRCB, Sacramento, CA



# Legend



Study Area D



Sample Points



Facility Headquarters and Levees

## Presumed Jurisdictional Areas



Bittern Complex



Crystallizer Complex



Pickle Complex



Multi-Use Area Complex



U.S. Army  
Corps of Engineers  
San Francisco District  
Regulatory Division

## **Preliminary Jurisdictional Determination**

**Locations of waters of the U.S. or wetlands  
pursuant to Section 404 of the Clean Water Act  
and Section 10 of the Rivers and Harbors Act of 1899**

### **DMB Redwood City Saltworks**

located north of US 101 and east of Seaport Boulevard  
in the City of Redwood City, San Mateo County, California  
(portions of APN 054-310-160, 054-300-230 and 054-300-670)

Section 404 of the Clean Water Act other waters and  
Section 10 of the Rivers and Harbors Act of 1899 locations are:  
Bittern, Crystallizer, Pickle and Multi-Use Area Complexes

----- Project Boundary  
File Number: 26726S

Sheet 4 of 4  
Date: February 22, 2010

## Downing, Donna

---

**From:** Brush, Jason  
**Sent:** Monday, February 09, 2015 1:49 PM  
**To:** Eisenberg, Mindy  
**Cc:** Scianni, Melissa; Woo, Nancy; Kermish, Laurie; Moore, Linda; Downing, Donna; Kaiser, Russell  
**Subject:** FW: controlled correspondence: Save the Bay letter to G.M. + Corps documents [Red Folder AX-15-000-4942] DUE 2/19/2015  
**Attachments:** AX-15-000-4942 Control Slip.pdf; AX-15-000-4942.pdf

Hi Mindy – Can you please confirm whether a R9 response to this AX is desired by OW management? In this particular instance, a response from the Region is not likely to satisfy the requestor, and the questions asked are specific to HQ actions. Happy to discuss by phone. Thanks - Jason

**Jason A. Brush**  
Supervisor, Wetlands Section  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street (WTR-2-4)  
San Francisco, CA 94105

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desk: 415.972.3483

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**From:** Vendlinski, Tim  
**Sent:** Friday, February 06, 2015 3:49 PM  
**To:** Brush, Jason  
**Cc:** Moore, Linda; Leidy, Robert; Ziegler, Sam; Valiela, Luisa  
**Subject:** controlled correspondence: Save the Bay letter to G.M. + Corps documents [Red Folder AX-15-000-4942] DUE 2/19/2015

Hi Jason:  
Given that you're the POC on this important issue, I'm forwarding the controlled correspondence to you for a reply and copying Linda to know that this exchange has been made.  
Thanks, Tim

><(((°>~...><(((°>~...><(((°>

Tim Vendlinski  
Senior Policy Advisor;  
Bay Delta Program Manager  
EPA Region 9  
75 Hawthorne Street (WTR-1)  
San Francisco, CA 94105-3901

(415) 972-3469 desk

><(((°>~...><(((°>~...><(((°>

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**From:** Moore, Linda  
**Sent:** Thursday, February 05, 2015 10:13 AM  
**To:** Vendlinski, Tim  
**Subject:** FW: Red Folder AX-15-000-4942 Due on 2/19/2015

Hi Tim,  
I'm assigning this AX to you for a response.  
Thank you

\*\*\*\*\*

*Linda Moore  
Water Division  
US EPA Region 9  
75 Hawthorne Street  
San Francisco, CA 94105  
(415) 972-3745 - work  
(415) 972-3549 - fax  
[moore.linda@epa.gov](mailto:moore.linda@epa.gov)*

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**From:** Kwok, Frances  
**Sent:** Wednesday, February 04, 2015 2:05 PM  
**To:** Moore, Linda  
**Cc:** Gaudario, Abigail  
**Subject:** Red Folder AX-15-000-4942 Due on 2/19/2015

Linda

ORA received the attached AX-15-000-4942. The subject is Protect San Francisco Bay's waters. The due date is February 19, 2015.

Thanks,

*Frances Kwok*  
Office of the Regional Administrator  
U.S. E.P.A. Region 9  
75 Hawthorne Street  
San Francisco, CA 94105  
(415) 947-4232  
[kwok.frances@epa.gov](mailto:kwok.frances@epa.gov)

Tue Feb 03 10:00:34 EST 2015  
Leavy.Jacqueline@epamail.epa.gov  
FW: Letter to Administrator McCarthy  
To: CMS.OEX@epamail.epa.gov

---

**From:** David Lewis [mailto:dlewis@savesfbay.org]  
**Sent:** Monday, February 02, 2015 6:11 PM  
**To:** Mccarthy, Gina  
**Subject:** Letter to Administrator McCarthy

Please see the attached letter and enclosures.

—  
David Lewis

Executive Director, Save The Bay

[dlewis@saveSFbay.org](mailto:dlewis@saveSFbay.org)

510.463.6802

[www.saveSFbay.org](http://www.saveSFbay.org)

February 2, 2015

The Honorable Gina McCarthy, Administrator

U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. Mail Code: 1101-A  
Washington, DC 20460

Dear Administrator McCarthy:

San Francisco Bay's waters are under attack, and we urgently need your leadership to preserve federal protection for them.

The U.S. Army Corps of Engineers is poised to relinquish federal Clean Water Act and Rivers and Harbors Act jurisdiction over San Francisco Bay salt ponds at the request of Cargill, the largest private corporation in the United States. Cargill's heavy lobbying of Corps lawyers resulted in two internal legal memos (attached) that would reverse decades of federal protection for Bay salt ponds, and upend long-established precedents. Their novel, unilateral re-interpretation of the Clean Water Act was created in secret, without EPA consultation, Congressional approval, or opportunity for public input.

This outrageous policy proposal from the Corps not only threatens to destroy a critical part of San Francisco Bay, it also would create a dangerous precedent that threatens federal oversight and regulation of other Waters of the United States. The Corps' failure to consult with the U.S. EPA, after previously committing to do so in this matter, repeats a dangerous pattern that should not be allowed to stand.

Scientists agree that Cargill's salt ponds in Redwood City are one of the most important shoreline habitats on the west side of San Francisco Bay. Surrounded by the Don Edwards San Francisco Bay National Wildlife Refuge, the ponds are a wintering and migratory spot for tens of thousands of shorebirds annually. There are fewer than 2,000 breeding pairs of the endangered Western Snowy Plover on the Pacific Coast, and plovers breed on those ponds. For these reasons, the ponds are within the already-authorized acquisition area of the wildlife refuge, and the U.S. Fish and Wildlife Service's Tidal Marsh Recovery Plan identifies the ponds as a priority opportunity site for tidal marsh habitat to benefit even more wildlife and the people of the Bay Area. Nearly-identical retired salt ponds near Vallejo were reconnected to the Bay several years ago, and wildlife is already flocking back to that restored habitat. Redwood City's salt ponds can have the same future – if the EPA preserves Clean Water Act protections for the ponds.

Cargill publicly declared its goal in 2012 – to win exemption from the Clean Water Act and other regulations for salt ponds in Redwood City, California, so it can pave over wetlands there to build thousands of homes in the Bay. The EPA has thus far preserved legal protection for the Bay's salt ponds, and it should continue to do so. We therefore encourage you to insist that the Secretary of the Army immediately:

1. Order the Corps to withdraw its two memoranda on this issue ("Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant" January 9, 2014, and the March 25, 2014 supplement to that memo) and explicitly declare both memoranda null and void.
2. Instruct the Assistant Secretary of the Army for Civil Works to consult formally with EPA Region 9 officials on this and any other review of the Clean Water Act and its application to salt ponds in San Francisco Bay, and develop a joint position on the

appropriate legal interpretation and application of the Act to these ponds.

Should the Corps attempt to issue a determination declining to exercise Clean Water Act jurisdiction over this site, we encourage you to declare this a "special case" and ensure that the EPA takes over the determination process. The Corps process and actions to date regarding Redwood City salt ponds clearly justify EPA reasserting the lead responsibility for evaluating federal protection of these important waters of the United States.

Thank you for taking action to protect Waters of the United States.

Sincerely,

David Lewis

Executive Director

Save The Bay

1330 Broadway, Suite 1800

Oakland, CA 94612

Enclosures



February 2, 2015

The Honorable Gina McCarthy, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. Mail Code: 1101-A  
Washington, DC 20460

Dear Administrator McCarthy:

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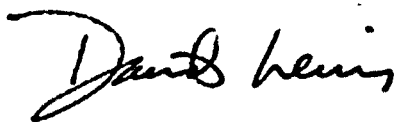
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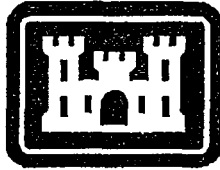
Thank you for taking action to protect Waters of the United States.

Sincerely,

A handwritten signature in black ink that reads "David Lewis". The signature is fluid and cursive, with the first name "David" being more prominent than the last name "Lewis".

David Lewis  
Executive Director  
Save The Bay

Enclosures



**Legal Principles to Guide the Approved**  
**Jurisdictional Determination for the**  
**Redwood City Salt Plant**

CECC-ZA

9 January 2014

**Introduction and Summary of Conclusions**

For more than a century, private industry has been conducting salt making operations in the San Francisco Bay area. Because the salt making facilities are constructed at sites in or near tidal waters, there has been ongoing interest in the Corps' authority to exercise jurisdiction over these sites under Section 10 of the Rivers and Harbors Act of 1899 (RHA) and Section 404 of the Clean Water Act (CWA). Most recently, this interest has focused on the Redwood City salt plant, which is a part of Cargill's larger salt making operations in the Bay area.

DMB Redwood City Saltworks, the entity that represents Cargill and the potential developer of the site, has recently requested an approved jurisdictional determination for the 1,365 acre salt plant facility in Redwood City, CA. Because of this request, the Corps must examine the relevant laws and regulations as interpreted by the courts to identify the legal standards applicable to a jurisdictional determination for the site.

On several occasions the Corps and the courts have addressed the question of jurisdiction over other property in the Bay area owned by Cargill and used for salt making operations. The decisions reached on those occasions have involved different facts and have been made against a backdrop of evolving jurisprudence regarding the extent of the Corps' regulatory jurisdiction under the RHA and CWA. While the Corps' understanding of RHA jurisdiction has not changed substantially in recent years, the Supreme Court has issued several landmark decisions addressing CWA jurisdiction since the last time a court has considered the issue as it relates to a salt making operation on the San Francisco Bay.

Relying on binding precedents of the Supreme Court and the Court of Appeals for the Ninth Circuit, this document sets forth the legal standards that must be applied in determining RHA and CWA jurisdiction over the site of the Redwood City salt plant. It explains that the government's RHA jurisdiction in tidal waters extends shoreward to the mean high water (MHW) mark in its unobstructed, natural state. It concludes that the Cargill Redwood City property should be divided into two parcels for analytical purposes, one developed before 1940 and the other developed after 1940. There is no evidence in the record to suggest that the

Army ever exerted RHA jurisdiction over the parcel developed before 1940; the parcel was either never subject to RHA jurisdiction or RHA jurisdiction has been surrendered. The other parcel was developed pursuant to a 1940 War Department permit, and the Army retains RHA jurisdiction up to the MHW mark as it existed immediately prior to the construction of levees and a dyke authorized in this permit. The 1940 War Department permit authorizing the levees and dyke should be given deference when determining the historic location of the MHW mark. Finally, this document concludes that the liquids on both parcels, which have been subject to several years of industrial salt making processes, are not "waters of the United States" subject to CWA jurisdiction.

## Discussion

### Factual Setting<sup>1</sup>

As previously mentioned, a significant portion of the southern San Francisco Bay shoreline has been used for the production of salt through a process called solar evaporation. The Redwood City Saltworks site is comprised of approximately 1,365 acres that currently and/or historically have been used to make salt. The development of the Redwood City site can be described as having occurred on two distinct parcels in two phases, one of which involved a War Department permit issued in 1940 to a former owner, the Stauffer Chemical Company.<sup>2</sup> The two parcels are highlighted in different colors on the attached map.<sup>3</sup>

Parcel 1: The first phase of development occurred prior to 1940 and involved the western portion of the site, roughly between the historic location of First Slough and the current location of Seaport Boulevard. This portion of the site is identified in green on the attached map. It is bounded by a railroad line on the west, Bayshore Highway on the south, an existing levee on the east, and Westpoint Slough on the north. In 1940, it was shown as containing "Salt Evaporating Ponds," "Reclaimed Marsh," and a cement works.<sup>4</sup> This area approximately corresponds to the area that Cargill calls its crystallizer complex.<sup>5</sup>

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<sup>1</sup> The information presented in this section explains the context of the discussion of controlling legal standards and is based on the applicant's submission, information conveyed during site visits, and other sources. A formal determination of the physical characteristics of the site will be undertaken by the San Francisco District of the U.S. Army Corps of Engineers during the processing of the request for an approved jurisdictional determination.

<sup>2</sup> War Department Permit issued to Stauffer Chemical Company, January 16, 1940. The permit includes a diagram of the levee and dyke profiles in relation to the surrounding topography marked "Sheet 1" and a map of the site marked "Sheet 2." These documents together will be collectively referred to as "the permit" or "1940 permit."

<sup>3</sup> The attached map is a copy of the map that accompanied the 1940 permit and was identified as "Sheet 2" of that permit. The color highlighting has been added.

<sup>4</sup> War Department Permit issued to Stauffer Chemical Company, January 16, 1940 (Sheet 2); see also Attachment C to Exhibit 7 of the Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012).

<sup>5</sup> See Exhibit 2 of the Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012).

**Parcel 2:** The second phase of development occurred after 1940, immediately east of the first phase of development. The parcel where this development occurred is shown in red on the attached map. The development was undertaken pursuant to a War Department permit authorizing construction of "an earth dyke or levee across and along the bank of First Slough, and along the banks of Westpoint Slough and an unnamed tributary thereof" to enclose an area immediately east of the first development.<sup>6</sup> This area was leveed off from the Bay and developed into a complex of containment cells for salt production. The parcel is bordered on the west by the existing levee that forms the eastern border of the area developed prior to 1940, except that this common border diverges at the "Location of the Proposed Dam" across First Slough. From that point, the western border of the parcel follows the eastern shore of First Slough north, where the proposed levee or dyke is shown as a darker line. The northern border of the parcel follows this dark line along the southern shore of Westpoint Slough, and the eastern border follows the same darker line along the western shore of the unnamed tributary to Westpoint Slough. The southern border is the darker line that generally parallels the "Road on Levee." It approximately corresponds to the area Cargill calls its pickle and bittern complexes.<sup>7</sup>

The Redwood City salt plant entails only the later stages of the salt production process.<sup>8</sup> The initial stages of the process are conducted on other parcels, where the process begins by pumping raw Bay water into a leveed evaporation pond. The water is moved through a series of containment cells as the salinity increases. After approximately four years of subjecting the water to solar evaporation at other locations, the resulting liquid ("pickle") is transferred to the pickle complex at the Redwood City facility. Additional solar evaporation occurs there until the solution is saturated, at which point the pickle is moved into the crystallizer cells where the salt precipitates out of suspension. The resulting liquid, called "bittern," is pumped into the bittern complex cells, where it is stored until moved off site to be sold or recycled back into the salt production process. The salt that remains on the floor of the crystallizer cells is then mechanically scraped from the dry ground and loaded into trucks to be moved offsite.

## **Rivers and Harbors Act of 1899**

### **Overview**

Congress enacted the RHA to protect the navigable capacity of tidal and non-tidal waters. RHA jurisdiction is closely connected to the Federal navigation servitude, which reaches to the limits of navigable waters and permits the sovereign to prevent or remove

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<sup>6</sup> War Department Permit Issued to Stauffer Chemical Company, January 16, 1940.

<sup>7</sup> *Id.*

<sup>8</sup> This description is based on the Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012).

obstructions to navigation without compensation. This document explains that RHA jurisdiction extends to the MHW mark, which ordinarily is determined by identifying a line on the shore based on the average high tides over a period of years. This line can be ambulatory and special rules may apply to account for forces of nature, which may cause a shoreline to increase or decrease, or manmade improvements that counter these forces. Even where jurisdiction may normally attach, it may be surrendered by the government. Applying these legal precepts is necessary to determine the limits of RHA jurisdiction over Cargill's Redwood City property.

#### Geographic Scope of RHA Jurisdiction

The RHA regulates obstructions to the navigable capacity of any "navigable water of the United States."<sup>9</sup>

[It] prohibits the creation of 'any obstruction not affirmatively authorized by Congress[] to the navigable capacity of any of the waters of the United States' [and] . . . make[s] it unlawful to 'build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army' or to 'excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.'<sup>10</sup>

Citing Supreme Court precedents, the Ninth Circuit has recognized that:

The term "navigable waters" has been judicially defined to cover: (1) nontidal waters which were navigable in the past or which could be made navigable in fact by "reasonable improvements," *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921); and (2) waters within the ebb and flow of the tide. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1851); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927.<sup>11</sup>

With respect to tidal waters, the Supreme Court has held that the term "navigable waters" as used in the RHA, extends to all places covered by the ebb and flow of the tide to the MHW

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<sup>9</sup> 33 U.S.C. § 403.

<sup>10</sup> *U.S. v. Milner*, 583 F.3d 1174, 1191 (9th Cir. 2009) (quoting 33 U.S.C. § 403).

<sup>11</sup> *Leslie Salt Co. v. Froehike*, 578 F.2d 742, 753 (9th Cir. 1978) (hereinafter "*Froehike*"). This is consistent with the general definition of "navigable waters of the United States" codified in regulation at 33 C.F.R. § 329.4.

mark.<sup>12</sup> This regulatory authority "is not dependent upon the depth and shallowness of the water," and includes "[m]arshlands and similar areas" that are "subject to inundation by the mean high waters."<sup>13</sup> The MHW mark is determined by where on the shore the average of all high tides reaches over a period of 18.6 years.<sup>14</sup>

RHA jurisdiction is coextensive with the reach of the federal navigation servitude.<sup>15</sup> The navigation servitude,

sometimes referred to as a "dominant servitude," . . . or a "superior navigation easement," . . . is the privilege to appropriate without compensation which attaches to the exercise of the "power of the government to control and regulate navigable waters in the interest of commerce." *United States v. Commodore Park*, 324 U.S. 386, 390, 65 S.Ct. 803, 89 L.Ed. 1017.<sup>16</sup>

The limits of RHA jurisdiction and the navigation servitude are coextensive because their origins are grounded in the same desired purpose of preserving the navigable capacity of waterways.

In summary, the general rule in tidal areas is that RHA jurisdiction extends to the line on the shore reached by the plane of the mean high water averaged over a period of 18.6 years. This general rule applies when there is a relatively static, natural shoreline. But shorelines may not remain static. Oceans may rise, tides may wash away beaches, and humans may build bulkheads on the shore. If the shoreline has changed or has otherwise been altered, additional analysis must be undertaken to determine if the extent of jurisdiction has changed along with the changes to the shoreline, or if the extent of jurisdiction remains fixed at the MHW mark as it existed before the changes. If there have been changes in the shoreline, jurisdiction is either ambulatory, following the changes in the shoreline, or indelible, remaining fixed despite the changes.

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<sup>12</sup> *Barax*, 296 U.S. at 26-27. See 33 C.F.R. § 329.12(a)(2), which was changed in a rulemaking in 1982 in response to the *Froehke* decision to eliminate the sentence that established the shoreward limit of navigable waters on the Pacific coast as the mean higher high waters. This regulatory change made the shoreward limit of jurisdiction for all coastal waters (Atlantic and Pacific) the same – the mean high water mark. 47 Fed. Reg. 31794, 31797-98 (July 22, 1982).

<sup>13</sup> See *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 263 (1915) and 33 C.F.R. § 329.12(b).

<sup>14</sup> *Barax Consolidated v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935); *Froehke*, 578 F.2d at 746.

<sup>15</sup> *Froehke*, 578 F.2d at 748-750, 752 ("The navigational servitude reaches to the shoreward limit of navigable waters.").

<sup>16</sup> *U.S. v. Virginia Electric Co.*, 365 U.S. 624, 327-28 (1961) (quoted in *Froehke*, 578 F.2d at 752).

### Ambulatory Nature of Jurisdiction

The scope and extent of RHA jurisdiction is ambulatory when there are gradual, lasting shifts in the volume of the water body or the character of the banks or shoreline.<sup>17</sup> In such cases, jurisdiction changes to follow the changing path and extent of the water:

It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold the stream as his boundary; if his land is increased, he is not accountable for the gain, and if it is diminished he has no recourse for the loss. But where a stream suddenly and perceptibly abandons its old channel, the title is not affected, and the boundary remains at the former line.<sup>18</sup>

The Supreme Court has described how Federal regulatory authority shifts to follow the course of a water body as it moves over time, just as title follows the course of a water body as it moves over time:

Nor is the authority of Congress limited to so much of the water of the river as flows over the bed of forty years ago. The alterations produced in the course of years by the action of the water do not restrict the exercise of Federal control in the regulation of commerce. Its bed may vary and its banks may change, but the Federal power remains paramount over the stream, and this control may not be defeated by the action of the state in restricting the public right of navigation within the river's ancient lines. The public right of navigation follows the stream and the authority of Congress goes with it.<sup>19</sup>

Thus, the contours of RHA jurisdiction change when the physical changes to the course or shoreline of a water body are gradual and long-lasting.<sup>20</sup> If the changes to the course or shoreline are sudden and perceptible due to avulsion<sup>21</sup> or man-made improvements, then the principle of indelible navigability applies to fix the previous limits of jurisdiction despite the changes as discussed further below.

<sup>17</sup> *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 189 (1890) (cited in *Millner*, 583 F.3d at 1187).

<sup>18</sup> *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 (1912). See also *Oklahoma v. Texas*, 260 U.S. 606 (1923); *Hughes v. Washington*, 389 U.S. 290 (1967).

<sup>19</sup> *Philadelphia Co. v. Stimson*, 223 U.S. at 634-35.

<sup>20</sup> *State of Cal. ex rel. State Lands Commission v. U.S.*, 805 F.2d 857, 864 (1986) ("When a water line that constitutes a property boundary changes gradually and imperceptibly by the gradual deposit of solid material on its shore (accretion) or by gradual recession (reliction), the property boundary changes with it. . . . In such a situation, title is "ambulatory.").

<sup>21</sup> *Id.* at 864 ("where a water line changes violently and visibly, i.e., by avulsion, the property boundary does not change with the water but remains where it was prior to the change").

### The Principle of Indelible Navigability

The principle of indelible navigability holds that sudden or man-made changes to a water body or its navigable capacity do not alter the extent of RHA jurisdiction, and thus the area occupied or formerly occupied by that water body will always be subject to RHA jurisdiction. This principle was discussed and relied upon by the Supreme Court in *Economy Light & Power*,<sup>22</sup> and has been incorporated in the Corps' definition of "navigable waters of the United States:" "A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which may impede or destroy navigable capacity."<sup>23</sup> The rule is expanded upon in 33 C.F.R. §§ 329.9 and 329.13: "an area will remain 'navigable in law,' even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change."<sup>24</sup> These regulatory definitions implementing the rule of indelible navigability have been unchanged since September 9, 1972.<sup>25</sup>

The Ninth Circuit decision in *Froehlke* embraced the rule of indelible navigability. The court reversed the lower court decision that "the Corps's jurisdiction under the River and Harbors Act includes all areas within the former line of MHHW in its unobstructed, natural state" and instead ruled that jurisdiction is to be fixed at the former line of MHW in its unobstructed, natural state.<sup>26</sup> The opinion cited to "the principle in *Willink* . . . that one who develops areas below the MHW line does so at his peril" as dictating this result.<sup>27</sup> Thus, while RHA jurisdiction "extend[s] to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state," where the natural state has been obstructed by a sudden change or an artificial change intended to produce that result, the former mean high water line as it existed before the obstruction becomes the fixed limit of RHA jurisdiction.<sup>28</sup>

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<sup>22</sup> *Economy Light & Power Co. v. U.S.*, 256 US 113, 118 (1921) ("The fact . . . that artificial obstructions [to navigation] exist capable of being abated by due exercise of the public authority, does not prevent the [water body] from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state. The authority of Congress to prohibit added obstructions is not taken away by the fact that it has omitted to take action in previous cases.")

<sup>23</sup> 33 C.F.R. § 329.4.

<sup>24</sup> 33 C.F.R. § 329.13.

<sup>25</sup> 37 Fed. Reg. 18289-92 (Sept. 9, 1972).

<sup>26</sup> *Froehlke*, 578 at 753.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; 33 C.F.R. § 329.13. The principle of indelible navigability does not apply when natural changes that come about slowly due to accretion or reliction alter the course or limits of a water body. In such cases, "[t]he public right of navigation follows the stream . . . and the authority of Congress goes with it." *Philadelphia v. Stimson*, 223 U.S. 605, 634-635 (1912).

The Ninth Circuit issued a decision after its *Froehlke* decision that also addressed the effect of levees on RHA jurisdiction. The decision in *Milner* considered whether a shore defense structure that was constructed in uplands beyond RHA jurisdiction could become jurisdictional if gradual erosion caused the shoreline to move to intersect the previously constructed shore defense structure, such that the structure was now located in jurisdictional waters. The court found that such shore defense structures were subject to RHA jurisdiction, but did not determine how to fix the limits of RHA jurisdiction. Unlike the shore defense structures under consideration in *Milner*, the levees before us at the Cargill Redwood City site were permitted, water is not passing through or over them, erosion is not a factor, and there is no indication that the levees are in any way obstructing navigation.<sup>29</sup> *Milner* did not change the rule in *Froehlke* and is not applicable to circumstances at the Redwood City site.

Thus, under current Ninth Circuit jurisprudence, RHA jurisdiction in the San Francisco Bay area generally applies "to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state."<sup>30</sup> The Federal regulations implementing the RHA are consistent with this rule of law and define the jurisdictional scope of the RHA statute to be fixed if "later actions or events [such as the construction of a levee or other improvement] . . . impede or destroy navigable capacity."<sup>31</sup>

#### Surrender of Jurisdiction

Several courts have added nuance to the principle of indelible navigability, specifically by introducing the concept of surrender of jurisdiction. The Third Circuit introduced the concept of surrender of jurisdiction in the case of *United States v. Stoeco Homes, Inc.*, which concerned the jurisdictional status of a parcel of land that had previously been a salt marsh subject to the ebb and flow of the tide, some areas of which had been filled to form fast land several decades earlier.<sup>32</sup> At the time the land at issue in *Stoeco* was filled, it was behind established harbor lines and it was Corps policy not to require any RHA permits for filling shoreward of established bulkhead lines.<sup>33</sup> The question before the court in *Stoeco* was whether blanket permission to fill behind established bulkhead lines could lead to the

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<sup>29</sup> If there was any obstruction of navigation, the Corps could protect the navigable capacity of the waters by invoking subsection (f) of the 1940 permit.

<sup>30</sup> *Froehlke*, 578 F.2d at 753.

<sup>31</sup> "A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which may impede or destroy navigable capacity." 33 C.F.R. § 329.4. The rule is expanded upon in sections 329.9 and 329.13 of the regulations: "an area will remain 'navigable in law,' even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change." 33 C.F.R. § 329.13.

<sup>32</sup> *U.S. v. Stoeco Homes, Inc.*, 498 F.2d 597, 600 (3rd Cir. 1974).

<sup>33</sup> *Id.* at 602-603.

permanent loss of RHA jurisdiction if the land was "improved" while the permission was in effect.<sup>34</sup> The Third Circuit looked at the statutory language and found:

Section 10 by its plain language contemplates congressional consent to some encroachments on the navigational servitude, and delegates to the Army Corps of Engineers and the Secretary of the Army authority to grant such consent on its behalf. If the administrative agency gives an express consent by permit in a specific instance, with no reservation of the right to compel removal, surely that consent must be considered to be a surrender of the federal servitude over the fee in question.<sup>35</sup>

In *Stoeco*, the "improved" land was made fast by filling "substantially above mean high tide,"<sup>36</sup> and the court expressly limited the holding finding surrender "to tidal marshlands which had become fast land" during the time that the filling of those waters was permitted without restriction or reservation.<sup>37</sup> However, the fact that the improvement that resulted in a finding of surrender in this case was making the land fast does not mean that this is the only way a surrender could occur through improvement or modification of jurisdictional waters.

In *Froehke*, the Ninth Circuit suggested that the concept of surrender could apply in the San Francisco Bay, as well. In evaluating the scope of RHA and CWA jurisdiction over salt plants within the Bay, the Ninth Circuit held that "in tidal areas, 'navigable waters of the United States,' as used in the Rivers and Harbors Act, extend to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state."<sup>38</sup> However, the court continued:

Our holding that the MHW line is to be fixed in accordance with its natural, unobstructed state is dictated by the principle recognized in *Willink*, supra, that one who develops areas below the MHW line does so at his peril. We recognize that under this holding issues of whether the Government's power may be surrendered or its exercise estopped, and if so, under what circumstances and to what extent, may arise. Leslie, for example, may contend that there has been a surrender by the Corps of its

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<sup>34</sup> The three-part inquiry that the Third Circuit made to determine whether RHA jurisdiction was surrendered in *Stoeco* included "whether Congress intended that §10 was intended [sic] to have continuing application to improved land formerly within the navigable waters of the United States." *Stoeco*, 498 F.2d at 608 (emphasis added). "Improve" is defined by Webster's as, inter alia, "to augment or enhance in value or good quality; to make more profitable, excellent, or desirable;" and "to enhance in value by bringing under cultivation or reclaiming for agriculture or stock raising." *Webster's New International Dictionary of the English Language*, Second Edition, Unabridged, 1939.

<sup>35</sup> *Stoeco*, 498 F.2d at 610.

<sup>36</sup> *Id.* at 600.

<sup>37</sup> *Id.* at 611.

<sup>38</sup> *Froehke*, 578 F.2d at 754.

power under the Rivers and Harbors Act with respect to certain land below the MHW line.<sup>39</sup>

The court also observed that "at this time it is not necessary for us to pass on issues such as were before the court in *Stoeco*."<sup>40</sup> Thus, the Ninth Circuit recognized that it may be possible that the United States could surrender jurisdiction, but the court did not rule on this point.

#### Surrender Applied to the Redwood City Salt Plant

In the case of the Redwood City salt plant, separate surrender analyses are necessary for the two parcels described above because of their distinctive histories.

The western portion of the site (parcel 1, shown in green on the attached map) was already improved for salt-making purposes at the time the January 16, 1940, War Department permit was issued. The map accompanying the 1940 War Department permit shows this parcel as "Salt Evaporating Ponds" and "Reclaimed Marsh," and identifies the location of the existing levee surrounding those areas.<sup>41</sup> There is no evidence that the Corps ever asserted jurisdiction over this area or the construction of the levees on this parcel.<sup>42</sup> Given the acquiescence of the Corps to the improvement of the western portion of the site prior to 1940, either the property was never subject to RHA jurisdiction or RHA jurisdiction has been surrendered.<sup>43</sup>

The analysis is different for the eastern portion of the site (parcel 2, shown in red on the attached map), which was leveed off from the San Francisco Bay pursuant to the 1940 War Department permit. Here, the question of whether the Corps retains RHA jurisdiction over formerly tidal waters is principally informed by the terms of the permit. The permit authorized the Stauffer Chemical Company, Cargill's predecessor in interest, to:

construct an earth dyke or levee across and along the bank of First Slough, and along the banks of Westpoint Slough and an unnamed tributary thereof, in Westpoint Slough at about 1.0 mile southeasterly of the mouth of Redwood Creek, San Mateo County,

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<sup>39</sup> *Id.* at 753.

<sup>40</sup> *Id.*

<sup>41</sup> Aerial photographs submitted by the applicant show the levees depicted on the 1940 permit existed in the same configuration in 1930. See Attachment C to Exhibit 7 of the Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012).

<sup>42</sup> This is consistent with the Corps practice immediately following the passage of the RHA of only regulating areas and activities that would have a relatively direct impact on the navigable capacity of navigable waters. See *Stoeco*, 498 F.2d at 606.

<sup>43</sup> *Stoeco* holds that the "long-standing administrative practice" not to require explicit or specific permission to fill behind harbor lines prior to 1970 was sufficient consent to surrender the navigation servitude. Similarly, the administrative practice of only regulating activities that would have a relatively direct impact on the navigable capacity of waters at the turn of the last century may also be sufficient to surrender the navigation servitude where navigable waters were filled or otherwise developed with the acquiescence of the Federal government during that period.

California, in accordance with the plans shown on the drawing attached hereto marked "Proposed Dam and Levee East of Redwood Cr., San Mateo County, California, Application by Stauffer Chemical Co., Dated Dec. 1939."<sup>44</sup>

The permit also contains a number of conditions that are designed to protect the navigable capacity of the named waters. It is accompanied by a map (Sheet 2) and a diagram (Sheet 1), which depicts certain features of the site and elevation data. Reading these documents together, it is clear that the Army was exercising its jurisdiction under the RHA when it sought to regulate the construction of these improvements under the permit.

The permit also contains an express reservation that allows the United States to force the removal of any of the permitted work:

That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstruction caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed.<sup>45</sup>

This condition would seem to be exactly the type of "reservation of the right to compel removal" that the Third Circuit indicated could prevent surrender of jurisdiction.<sup>46</sup> While this reservation has limitations regarding when the Corps can order removal of permitted fill, the fact that there is *any* reservation is sufficient to put the landowner on notice that "one who develops areas below MHW does so at his own peril"<sup>47</sup> and thus prevents a surrender of jurisdiction. Because there is no surrender, the areas previously below the MHW mark continue to be regulated under the RHA.

On this basis, surrender has not been triggered and the rule of indelible navigability applies to the eastern portion of the site. Accordingly, any areas that were RHA jurisdictional waters when the levees were permitted in 1940 are still jurisdictional under the RHA.

#### Determining the Extent of RHA Jurisdiction

With these legal rules in mind, the San Francisco District should expeditiously finalize the jurisdictional determination for the Redwood City salt plant site. Consistent with the

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<sup>44</sup> War Department Permit issued to Stauffer Chemical Company, January 16, 1940.

<sup>45</sup> Condition (f) of the January 16, 1940 War Department permit.

<sup>46</sup> See *Stoeco*, 498 F.2d at 610.

<sup>47</sup> *Froelke*, 578 F.2d at 753

foregoing discussion, the determination should include different findings for the two parcels comprising the site.

For the western portion of the site (parcel 1, highlighted in green on the attached map), RHA jurisdiction does not attach. There is no evidence that the Army ever asserted jurisdiction over this area or the construction that took place on this parcel. Either the property was never subject to RHA jurisdiction or RHA jurisdiction has been surrendered. No further analysis is required for this parcel.

For the eastern portion of the site (parcel 2, highlighted in red on the attached map), which is bordered by the levees that were authorized by the 1940 permit and which includes the area behind the dyke on First Slough, jurisdiction has not been surrendered and is retained by the rule of indelible navigability. For this area, the scope of RHA jurisdiction was fixed at the time the levees were constructed. Accordingly, the District must determine what areas of the parcel, if any, were below the MHW mark at the time the levees were constructed.

In making this determination, the District must take into account the information contained in the 1940 permit and accompanying attachments. These documents reflect the understanding of the parties at the time the permit was issued and should be accepted as the best available evidence of the locations of the features of the site, the elevations of the levees and dyke to be constructed, and the resources warranting protection. The permit identifies three of the more substantial features, First Slough, Westpoint Slough, and an unnamed tributary thereof, in specifying the location of the levees to be constructed.<sup>48</sup> The terms of the permit indicate that these were the waters that the terms and conditions were intended to protect. The diagram accompanying the permit (Sheet 1) shows that the base of the dyke that was constructed across First Slough was below the MHW mark. It also shows that the other levees on the site were to be constructed on marshlands at locations near the above named waters at elevations generally equal to the mean higher high water mark, which is above the MHW mark. The marshlands appear to be identified by horizontal lines shading specific areas of the map. Finally, the map (Sheet 2) also shows the levees crossing three smaller sloughs. These smaller sloughs are not specifically identified in the permit. The permit and its accompanying documents are silent on the elevations of these sloughs and on whether the Army intended to extend RHA protection to them.

In finalizing its jurisdictional determination for this parcel, the District may also consider other existing historical information that supplements the information contained in the permit and its accompanying documents to ensure a full and accurate understanding of the site. However, the District has the burden of substantiating the location of any tidal waters that

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<sup>48</sup> War Department Permit issued to Stauffer Chemical Company, January 16, 1940.

were below the MHW mark at the time the levees were constructed to assert RHA jurisdiction over those areas. The information and representations in the permit should receive deference unless there is convincing evidence that the other historical materials provide a more accurate representation of the site at the time the levees were constructed.

## Clean Water Act

### Overview

The geographic extent of CWA jurisdiction is a distinct question from RHA jurisdiction.<sup>49</sup> The geographic extent of CWA jurisdiction is generally greater than that under the RHA; however, that is not always the case.<sup>50</sup> Because of the different goals of the statutes and as a consequence of the rule of indelible navigability, some areas that are no longer covered by "waters" may be subject to RHA jurisdiction but not CWA jurisdiction. There is no comparable rule of indelible jurisdiction for the CWA.<sup>51</sup> The following discussion analyzes the CWA and implementing regulations in light of relevant legal precedent to determine whether the site of the Redwood City salt plant is subject to CWA jurisdiction. It concludes that the liquid pickle and bittern on the site is not "water" and that therefore these liquids are not subject to CWA jurisdiction. It examines the Ninth Circuit's basis for finding CWA jurisdiction over other Bay-area salt plant sites in *Froehlke*, and explains why that decision is not applicable to the Redwood City site.

### Factual Setting

The factual setting set forth at the beginning of this document is relevant to the discussion of CWA jurisdiction over the site. However, there are some details that are particularly relevant to CWA jurisdiction that merit mention here. Specifically, the entire site is controlled by Cargill, and other parties cannot access the site without Cargill's permission. The entire Redwood City site had been converted into its current configuration by 1951, before passage of the CWA in 1972, and has operated as an industrial salt-making facility since that time.<sup>52</sup> That conversion required significant manipulation of the immediate geography. The

<sup>49</sup> See *Millner*, 583 F.3d at 1194 ("the scope of the Corps' regulatory authority under the CWA and RHA is not the same").

<sup>50</sup> See *U.S. v. Riverside Bayview Homes, Inc.*, 474 US 121, 133 (1985) ("Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.").

<sup>51</sup> Environmental Protection Agency, *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980) ("When a portion of the Waters of the United States has been legally converted to fast land by a discharge of dredged or fill material, it does not remain waters of the United States subject to section 301(a). The discharge may be legal because it was authorized by a permit or because it was made before there was a permit requirement.").

<sup>52</sup> Redwood City Salt Plant Approved Jurisdictional Determination Submission (May 30, 2012) Attachment B. p. 9.

site is partitioned into various cells by a network of levees that also serve as roads and building pads.<sup>53</sup> Most of the cells are used to contain the liquids that are used to produce salt or that are a by-product of the salt making process. The process on this site begins when pickle is pumped from facilities at other locations after several years of processing. That liquid is then moved through a succession of cells at the Redwood City site before the salt is precipitated out of suspension in the crystallizer cells.<sup>54</sup> Once the salt precipitates out of solution, the remaining liquid, bittern, is moved into other cells to be recycled back into the process or sold for other uses.<sup>55</sup> The content of the cells is controlled by the operator of the site and all cells can be entirely drained.<sup>56</sup> For the solar evaporation process to work and increase the concentration of the pickle, the containment cells must be hydrologically separated from the neighboring Bay waters.<sup>57</sup> Any discharge of the pickle or bittern into CWA jurisdictional waters would require a CWA permit.<sup>58</sup>

#### CWA Statutory Scheme

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>59</sup> The statute makes "the discharge of any pollutant by any person [into the waters of the United States] . . . unlawful" unless such discharge is permitted under Section 402 or 404 of the Act.<sup>60</sup> The U.S. Environmental Protection Agency (EPA) administers the Section 402 program through the National Pollution Discharge Elimination System (NPDES) to regulate all pollutants except for dredged material and fill material.<sup>61</sup> As part of the NPDES program, EPA establishes effluent limitations guidelines that set pollution control standards for specific pollutants or classes of pollutants. Any discharge of pollutants with effluent limitations requires a permit and must meet those guidelines to comply with the CWA. The U.S. Army Corps of Engineer administers the Section 404 program to regulate the discharge of dredged material and fill material.<sup>62</sup>

The geographic scope of CWA jurisdiction is defined in statute as "navigable waters" and the "contiguous zone or the ocean."<sup>63</sup> "Navigable waters" is further defined by the statute to

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<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.* at 3-4.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 8.

<sup>58</sup> *Id.* at 25 n.49. See also 40 C.F.R. § 415.160 et seq.

<sup>59</sup> 33 U.S.C. § 1251.

<sup>60</sup> 33 U.S.C. § 1311. See also 33 U.S.C. § 1362(7) and (12) defining "navigable waters" and "discharge of a pollutant" respectively.

<sup>61</sup> 33 U.S.C. § 1342.

<sup>62</sup> 33 U.S.C. § 1344.

<sup>63</sup> 33 U.S.C. § 1362.

mean "the waters of the United States, including the territorial seas."<sup>64</sup> The structure of the statute makes it clear that the CWA was intended to protect more than just the "traditional navigable waters" that are jurisdictional under the RHA.<sup>65</sup> Congress meant for the definition of the term "navigable waters" to "be given the broadest constitutional interpretation"<sup>66</sup> because "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."<sup>67</sup> However, recent Supreme Court opinions have held that the term "navigable" cannot be read out of the statute when interpreting the jurisdictional scope of the CWA.<sup>68</sup> Thus, Corps permits are required for discharges of dredged material or fill material into "navigable waters" defined as "waters of the United States."

#### Regulations Implementing the CWA

The agencies charged with implementing the CWA, the EPA and the Corps, define "waters of the United States" by regulation to reach beyond "navigable waters" as that term was traditionally used to protect "all waters that together form the entire aquatic system."<sup>69</sup> While the regulatory definition of jurisdictional "waters of the United States" is broad, it does not cover everything that is wet.<sup>70</sup> Indeed, the Supreme Court has recognized that certain types of waters are not jurisdictional,<sup>71</sup> as has the Ninth Circuit.<sup>72</sup> EPA and Corps regulations set forth seven generally defined types of water bodies that are jurisdictional "waters of the United States:"

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa

<sup>64</sup> 33 U.S.C. § 1362(7).

<sup>65</sup> *Rapanos v. U.S.*, 547 U.S. 715, 731 (SCALIA, majority), 767-68 (KENNEDY, concurring) (2009).

<sup>66</sup> 42 Fed.Reg. 37122, 37127 (July 19, 1977) (quoting H.R. Report No. 92-1465 at 144).

<sup>67</sup> S.Rep. No. 92-414, 1972 U.S.C.A.N 3668, 3742 (1972).

<sup>68</sup> *Rapanos*, 547 U.S. at 731 (SCALIA, majority), 779 (KENNEDY, concurring).

<sup>69</sup> *U.S. v. Riverside Bayview Homes*, 474 US at 133 (quoting the preamble to the rulemaking establishing the regulations defining the geographic scope of CWA jurisdiction, 42 Fed.Reg. 37128 (1977)); see also 33 C.F.R. Part 328.

<sup>70</sup> For example, "non-tidal drainage and irrigation ditches excavated on dry land." 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

<sup>71</sup> See *Rapanos*, 547 U.S. 715; *Solid Waste Agency of Northern Cook County v. USACE*, 531 U.S. 159 (2001) (hereinafter "SWANCC").

<sup>72</sup> See *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700 (9th Cir. 2007) (holding that a pond alleged to be jurisdictional was not a "water of the United States" because "mere adjacency provides a basis for CWA coverage only when the relevant waterbody is a 'wetland,' and no other reason for CWA coverage of Cargill's pond is supported by evidence").

lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.<sup>73</sup>

Any water that does not fall within one of those defined types of water is not jurisdictional under the CWA. Additionally, even if a water falls within one of the seven defined types, jurisdiction will not attach if it is one of two categories of water explicitly excluded from jurisdiction by the regulations:

- (8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.<sup>74</sup>

Corps districts must determine if a water falls within one of the seven categories of jurisdictional water. If a district determines that the water does not fall within one of these seven categories or that it is one of the explicitly excluded types, then the water is not jurisdictional.

In reviewing this list of "waters of the United States," it is evident on first impression that the liquids on the Redwood City site do not fall clearly into any of the seven categories. The site has been highly altered to facilitate the salt manufacturing process. This alteration of the site and a century of industrial salt making have eliminated any trace of the prior marshland

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<sup>73</sup> 33 C.F.R. § 328.3(a).

<sup>74</sup> 33 C.F.R. § 328.3(a).

or wetland character of the site. The liquids on the site are intentionally hydrologically separated from the Bay and are not subject to the ebb and flow of the tide. While the liquids on the site originated as water from the Bay, they have been subjected to years of carefully managed processing that has rendered the liquids legally and chemically distinguishable from the water in the Bay. These liquids are wholly within the boundaries of the State of California and are not navigated in interstate commerce, or a part of the territorial seas. Likewise, the liquids are not impoundments of waters otherwise defined as waters of the United States.

These facts suggest that the liquids on the Redwood City site do not fall in any of the seven categories of "waters of the United States" as set forth in the regulations. However, several recent Supreme Court decisions have made the task of determining CWA jurisdiction more complicated than simply applying the regulations. The Court has twice found that the Corps' interpretation and application of the regulatory definition of "waters of the United States" exceeded the scope of jurisdiction provided by the CWA statute. Therefore, the Corps must apply both the regulatory definition of the scope of jurisdiction and the standards for jurisdiction established by the Supreme Court. A water must be determined to be jurisdictional under the regulations *and* the standards established by the Supreme Court for the CWA to apply.

#### CWA Applies Prospectively

The Supreme Court has "long declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."<sup>75</sup> This presumption holds true for the CWA. The CWA is intended "to regulate discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time."<sup>76</sup> This was recently confirmed by the Ninth Circuit in *Milner*:

if land was dry upland at the time the CWA was enacted, it will not be considered part of the waters of the United States unless the waters actually overtake the land, even if it at one point had been submerged before the CWA was enacted or if there have been subsequent lawful improvements to the land in its dry state.<sup>77</sup>

Thus, areas that were lawfully filled, either before the passage of the CWA or pursuant to a CWA permit, are no longer subject to CWA jurisdiction.<sup>78</sup> The fact that the majority of the area

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<sup>75</sup> *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994).

<sup>76</sup> 42 Fed. Reg. 37122, 37128 (July 19, 1977).

<sup>77</sup> *Milner*, 583 F.3d at 1195.

<sup>78</sup> Environmental Protection Agency, *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980) ("When a portion of the Waters of the United States has been legally converted to fast land by a discharge of dredged or fill material, it does not remain waters of the United States

within the Redwood City site was improved in a manner that did not necessarily raise the elevation above that of the MHW does not make this principal any less applicable. A CWA jurisdictional determination must be based on the site conditions today and not some prior site condition that no longer exists.<sup>79</sup>

#### Supreme Court Holdings on CWA Jurisdiction

The Supreme Court has twice found that the Corps' application of the regulations defining the jurisdictional scope of the CWA exceeded the statutory authority.<sup>80</sup> The Court expressed concern over the Corps' broad interpretation and application of the term "waters of the United States" in both cases. Indeed, the Supreme Court observed that in drafting those regulations, the agencies "deliberately sought to extend the definition of 'the waters of the United States' to the outer limits of Congress's commerce power."<sup>81</sup> The Supreme Court held "that 'the waters of the United States' in § 1362(7) cannot bear the expansive meaning that the Corps would give it"<sup>82</sup> and is "not 'based on a permissible construction of the statute.'"<sup>83</sup> In the most recent of those cases, *Rapanos*, the Supreme Court set out two alternative standards for determining CWA jurisdiction. As a result, the Corps must ensure that any assertion of CWA jurisdiction is consistent with the regulations *and* at least one of the two alternative standards established in the *Rapanos* decision.

The two alternative standards for determining what is jurisdictional under the CWA exist because Supreme Court's decision in *Rapanos* was issued without a majority opinion. Three Justices joined in the plurality opinion that Justice Scalia authored, which had arguably the narrower standard for what is jurisdictional under the CWA. Justice Kennedy concurred in the judgment but wrote his own opinion setting forth a different legal standard than that of the plurality. Four justices dissented and would have held that a far more inclusive standard applied. In such cases, controlling legal principles may be derived from those principles espoused by five or more Justices.<sup>84</sup> Therefore, there is CWA jurisdiction when the plurality's standard, authored by Justice Scalia, is satisfied, or when the standard in Justice Kennedy's

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subject to section 301(a). The discharge may be legal because it was authorized by a permit or because it was made before there was a permit requirement.").

<sup>79</sup> See *Millner*, 583 F.3d at 1195;

<sup>80</sup> *Rapanos*, 547 U.S. 715; *SWANCC*, 531 U.S. 159.

<sup>81</sup> *Rapanos*, 547 U.S. at 724 (SCALIA, plurality).

<sup>82</sup> *Id.* at 731-32 (SCALIA, plurality), 778-79 (KENNEDY, concurring).

<sup>83</sup> *Id.* at 739 (SCALIA, plurality).

<sup>84</sup> See *Marks v. United States*, 430 U.S. 188, 193-94 (1977); *Waters v. Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test ... that lower courts should apply," under *Marks*, as the holding of the Court); cf. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *Alexander v. Sandoval*, 532 U.S. 275, 281-282 (2001) (same).

concurring opinion is satisfied. The plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water . . . connected to traditional Interstate navigable waters," and to "wetlands with a continuous surface connection to" such relatively permanent waters.<sup>85</sup> Justice Kennedy held that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."<sup>86</sup>

#### Supreme Court on CWA Jurisdiction and What Constitutes "Waters"

Applying the standards for CWA jurisdiction set forth by the Supreme Court to the Redwood City site will be more instructive than applying the regulations to determine if the liquids located there are jurisdictional. This is because the liquids at the site raise a fundamental question: what kinds of liquids constitute "water" as that term would be understood by a majority of the Supreme Court?

In the Supreme Court's most recent decision regarding CWA jurisdiction, *Rapanos*, the plurality opinion emphasized that "the CWA authorizes federal jurisdiction only over 'waters.'"<sup>87</sup> The opinion analyzes the meaning of the statutory definition of "navigable waters," which is "the waters of the United States," to determine if the agencies' interpretation and application of that term is consistent with the authority conferred by the statute. The analysis includes an extensive dissection of the definition of "water" from the second edition of Webster's New International Dictionary because the term "water" is not defined in statute or regulation. The plurality concludes that the term can only mean "relatively permanent, standing or flowing bodies of water."<sup>88</sup> The plurality opinion cites to this definition to require a more limited scope of CWA jurisdiction than the agencies' interpretation, which allowed for CWA jurisdiction over certain intermittent and ephemeral waters. The plurality demanded that the scope of CWA jurisdiction "accord[] with the commonsense understanding of the term [water]."<sup>89</sup> The concurring opinion in *Rapanos* also looks at the same dictionary definition, but does so to show that an understanding of the term "waters" that is broader than the majority's also accords with the dictionary and common sense.<sup>90</sup> Justice Kennedy does not reject the principle that the definition of "water" needs to accord with the commonsense understanding, but rather he believes that a broader interpretation of the term is possible within such a commonsense understanding. The *Rapanos* decision shows that the Supreme Court will closely

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<sup>85</sup> *Rapanos*, 547 U.S. at 739, 742 (SCALIA, plurality).

<sup>86</sup> *Id.* at 759 (KENNEDY, concurring). Chief Justice Roberts wrote a separate concurring opinion explaining his agreement with the plurality. See 547 U.S. at 757-759.

<sup>87</sup> *Rapanos*, 547 U.S. at 731.

<sup>88</sup> *Id.* at 732.

<sup>89</sup> *Id.* at 733.

<sup>90</sup> *Id.* at 770.

examine regulatory interpretations of the scope of CWA Jurisdiction, and that while interpretations of language may differ, the Supreme Court will likely demand that any interpretation of "waters of the United States" be consistent with commonly accepted understandings of terms such as "water."

Applying this analysis to the Redwood City site, the Corps must determine whether the liquids on the site are "water" as a majority of the Supreme Court understands that term. The *Rapanos* decision is instructive on the type and method of inquiry involved, but the specific analysis in *Rapanos* is not relevant to the issue at hand because the discussion in that case contrasted geographic features that were regularly covered with water with features that were normally dry or only occasionally covered with water. It did not address what kinds of liquids qualify as "water." Therefore, we are left to apply the analytical rubric from *Rapanos* to this slightly different question regarding the meaning of the term "water."

Looking at the definition of "water" in the second edition of Webster's New International Dictionary, the same definition relied on by Justice Scalia in the plurality opinion in *Rapanos*, one finds that the first two definitions of "water" refer to the naturally occurring substance that (1.a.) "descends from the clouds in rain," (1.b.) the "substance having the composition H<sub>2</sub>O," or (2) "liquid substance occurring not chemically combined, in any of various quantities, states or aspects" . . . (2.a.) "[a]s derived from natural sources" or (2.b.) "[a]s found in streams and bodies forming geographical features such as oceans, rivers, lakes."<sup>91</sup> Only the third definition includes "liquid containing or resembling or of the fluidity and appearance of water" or a "liquid prepared with water, as by solution."<sup>92</sup> Tellingly, this later meaning of the term is defined by contrasting the liquid with "water," meaning that identifying such liquids as "water" is more attenuated and less "commonsense" than those described in the first two definitions.

Applying the *Rapanos* plurality's method of analysis, the "commonsense understanding" of "water" would include relatively naturally occurring forms of H<sub>2</sub>O such as those found in "rivers, lakes, and seas." This doesn't mean that only pure water, or pure sea water, is regulated under the CWA. After all, the Cuyahoga River was not a pure, unadulterated water when it caught fire in 1969. That event is widely regarded as "one of a handful of disasters that led to . . . the passage of the Clean Water Act."<sup>93</sup> So, it can be assumed that natural, but contaminated or adulterated, water bodies like the Cuyahoga in 1969 are among the types of

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<sup>91</sup> Webster's New International Dictionary 2882 (2<sup>nd</sup> ed. 1954) (hereinafter "Webster's Second").

<sup>92</sup> *Id.*

<sup>93</sup> Christopher Maag, *From the Ashes of '69, a River Reborn*, N.Y. Times, June 21, 2009, <http://www.nytimes.com/2009/06/21/us/21river.html>; see also *Rapanos*, 547 U.S. at 809 (STEVENS, dissent) ("Congress passed the Clean Water act in response to widespread recognition – based on events like the 1969 burning of the Cuyahoga River in Cleveland – that our waters had become appallingly polluted.").

waters that Congress intended to cover under the CWA. However, the liquids on the Redwood City site are a different sort. Those liquids are not within a natural water body; they are contained within an intentionally engineered industrial complex. The composition of the liquids is not a consequence of the discharge of pollutants or the disposal of wastes, but a consequence of a purposeful industrial process to create a product. And, unlike the Cuyahoga River, there are no potential users of the liquids at the Redwood City site other than the site owner that could be impacted by their composition.<sup>94</sup>

The commonsense understanding of the term "water," and one that accords with the definition of "water" in Webster's Second, does not include the pickle or bittern on the Redwood City site, which are products of an industrial process. Other than being in an aqueous form and being originally derived from Bay waters, the liquids on the Redwood City site are more commonly understood to be a chemical used in, or a byproduct of, an industrial process. Additionally, these liquids are regulated as a pollutant under Subpart P (Sodium Chloride Production Subcategory) of the CWA.<sup>95</sup> Thus, these liquids should be treated as an industrial product and not as "water," which is consistent with how EPA has classified this substance in its regulations and which means that they should not be treated as a jurisdictional water under the CWA.

#### Applicability of the CWA to the Redwood City Site

In sum, the pickle and bittern liquids at the Redwood City site are an industrial product regulated as a pollutant under the CWA; the site is not part of the aquatic system; and any discharge of the liquids to waters of the United States would require a CWA permit. Given these facts and the purposes the CWA is intended to serve, the pickle and bittern liquids at the site are *not* "water" potentially subject to jurisdiction under the CWA.

#### Leslie Salt Co. v. Froehlke

The *Froehlke* decision was discussed extensively in the section above on RHA jurisdiction, but it bears mentioning again here because that case addressed the jurisdictional status of Bay area salt ponds under the CWA as well as the RHA. In *Froehlke*, the Ninth Circuit

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<sup>94</sup> This is similar to waste treatment systems, which are categorically excluded from CWA jurisdiction in the regulatory definition of "waters of the United States" because they are not susceptible to being used by entities operating in interstate commerce other than the entity that controls the waste treatment system. The rationale behind this is that the agencies were concerned with regulating water pollution that has the potential to affect entities operating in interstate commerce, rather than regulating the use of waters in interstate commerce if that use had no potential to affect other users in interstate commerce. See EPA, Decision of the General Counsel, *NPDES Permits*, Opinion No. 73 (Dec 15, 1978); *National Pollutant Discharge Elimination System; Revision of Regulations, Final Rule*, 44 Fed.Reg. 32854, 32858 (June 7, 1979). See also, EPA, *A Collection of Legal Opinions*, Vol. 1 at 295.

<sup>95</sup> 40 C.F.R. § 415.160 et seq.

corrected the district court's holding that CWA jurisdiction was "coterminous" with RHA jurisdiction and that both were determined by identifying the "former line of MHHW of the bay in its unobstructed, natural state."<sup>96</sup> The Ninth Circuit made it clear that instead of being "coterminous" with RHA jurisdiction, CWA jurisdiction was generally broader than RHA jurisdiction.<sup>97</sup> The Ninth Circuit also addressed the question of "whether the Corps' jurisdiction covers waters which are no longer subject to tidal inundation because of man-made obstructions such as Leslie's dikes," which the court viewed as the central issue under review in that case.<sup>98</sup> In addressing this question, the court relied on the finding that the liquid behind the levees was the same as the water in the San Francisco Bay.<sup>99</sup> The court also noted that Leslie used the salt ponds to manufacture a product that is sold in interstate commerce as a basis for regulating them under the CWA.<sup>100</sup> On those grounds, the Ninth Circuit held that "the Corps's jurisdiction under the FWPCA [CWA] extends at least to waters which are no longer subject to tidal inundation because of Leslie's dikes without regard to the location of historic tidal water lines in their unobstructed, natural state."<sup>101</sup>

In sum, the *Froehlke* finding that CWA jurisdiction could extend to waters behind levees was based on two premises: first, that the liquid behind the levees was the "same" as the water in the Bay and equally worthy of protection from pollution; and second, that the end product that was extracted from the impounded water was sold in interstate commerce and therefore within the constitutional limits of the Commerce Clause. However, in the intervening 35 years since the *Froehlke* decision, there have been a number of Supreme Court cases that bear upon the continued validity of these premises and the Ninth Circuit's finding based upon them.

#### *Froehlke*: "Water" Behind Levees has a Status Equal to Water in the Bay

The Ninth Circuit's premise for affirming CWA jurisdiction in the *Froehlke* case, which is that the liquid behind the levees confining the Bay area salt plants was the "same" water as in the Bay, has been brought into doubt by intervening Supreme Court decisions, at least with respect to the liquids at the Redwood City site. As discussed above, by the time liquids are transferred to the Redwood City site, they have been processed for at least four years, resulting

<sup>96</sup> *Froehlke*, 578 F.2d at 753.

<sup>97</sup> *Id.* at 754-55.

<sup>98</sup> *Id.* at 754.

<sup>99</sup> *Id.* at 755 ("We see no reason to suggest that the United States may protect these waters from pollution while they are outside of Leslie's tide gates, but may no longer do so once they have passed through these gates into Leslie's ponds.").

<sup>100</sup> *Id.* ("Moreover, there can be no question that activities within Leslie's salt ponds affect interstate commerce, since Leslie is a major supplier of salt for industrial, agricultural, and domestic use in the western United States. Much of the salt which Leslie harvests from the Bay's waters at the rate of about one million tons annually enters interstate and foreign commerce.").

<sup>101</sup> *Id.* at 756.

in a significantly higher salinity than the Bay water; they have been hydrologically severed from the larger aquatic system; and they are regulated as pollutants under the CWA. The liquids at the Redwood City site are therefore chemically distinguishable, ecologically distinguishable, and legally distinguishable from the Bay waters. They are no longer the type of resource the CWA was intended to protect. The liquids at the Redwood City site are more commonly understood to be a chemical used in, or a byproduct of, an industrial process rather than "water."

Given what recent Supreme Court precedents reveal about the scope of CWA jurisdiction, we cannot reasonably expect to regulate as "water" liquids that have been managed as part of a closed-system industrial solar evaporation process for a period of several years or more and that are regulated as a pollutant under the CWA. Therefore, the Corps should not assert CWA jurisdiction over the industrial process (pickle and bittern) liquids at the Redwood City site.

#### Froehke: Interstate Commerce Connection

Because the industrial process liquids at the Redwood City site are not "water" for the purposes of CWA jurisdiction, the question of whether there is an interstate commerce connection with the liquids on the site is no longer relevant. Even with an appropriate interstate commerce connection to the liquids at the site, those liquids must be "water" for CWA jurisdiction to attach. Moreover, the Supreme Court's recent decisions requiring that "the word 'navigable' in the Act must be given some effect" or "significance" when interpreting the jurisdictional scope of the CWA suggest that the type of interstate commerce connection identified by the Ninth Circuit in *Froehke* is not the type of interstate commerce connection required to establish CWA jurisdiction.<sup>102</sup>

The specific interstate commerce connection the Ninth Circuit cited in *Froehke* was that "Leslie is a major supplier of salt for industrial, agricultural, and domestic use in the western United States."<sup>103</sup> This interstate commerce connection does not give any significance to the word 'navigable' in the Act.<sup>104</sup> After the Supreme Court's decisions in *SWANCC* and *Rapanos*,

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<sup>102</sup> *Rapanos*, 547 U.S. at 731 (SCALIA, majority), 779 (KENNEDY, concurring).

<sup>103</sup> *Froehke*, 578 F.2d at 755.

<sup>104</sup> Additionally, this type of interstate commerce connection was not what was contemplated by the agencies when the CWA regulations were developed. The valid test is not whether a liquid is susceptible to use in interstate commerce by the entity that controls the liquid, but rather whether a liquid is susceptible to use in a manner that would affect interstate commerce by entities other than the entity that controls the liquid. See EPA, *A Collection of Legal Opinions*, Vol. 1 at 295; EPA, Decision of the General Counsel, *NPDES Permits*, Opinion No. 73 (Dec. 15, 1978); 44 Fed.Reg. at 32858.

the Corps should not assert CWA jurisdiction under 33 C.F.R. § 328.3(a)(3) on the basis of a connection to interstate commerce unless there is a significant nexus to navigable waters.<sup>105</sup>

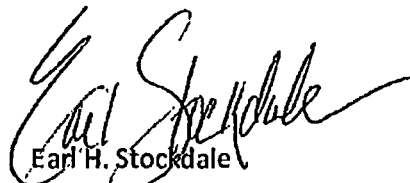
#### Bases for CWA Geographic Jurisdiction

There does not appear to be any reasonable legal basis for asserting CWA jurisdiction over the Redwood City site. The liquids on the site are more commonly understood to be chemicals used in, or a byproduct of, an industrial process rather than "water." Additionally, the *Froehlke* decision's findings on CWA jurisdiction have been brought into doubt by more recent Supreme Court decisions and should not be relied on when determining CWA jurisdiction at the Redwood City site. For these reasons, the Corps should not exercise CWA jurisdiction over the highly concentrated saline liquids ("pickle") or waste product from this process ("bittern"), and no further CWA analysis is required.

As mentioned above, CWA jurisdiction is normally broader than RHA jurisdiction, but that is not always the case.<sup>106</sup> In some instances CWA jurisdiction is narrower, such as where the principle of indelible navigability is invoked to assert RHA jurisdiction over areas that are no longer inundated with water. Such is the case here. *Milner* holds that this difference "is explained by the RHA's concern with preventing obstructions, on the one hand, and the CWA's focus on discharges into water, on the other."<sup>107</sup>

#### Continued Coordination

The close coordination between the San Francisco District, South Pacific Division, and Headquarters staff on the correct legal principles to apply when making RHA and CWA jurisdictional determinations at the Redwood City site is appreciated. This office looks forward to continuing that coordination on the approved jurisdictional determination for the site.

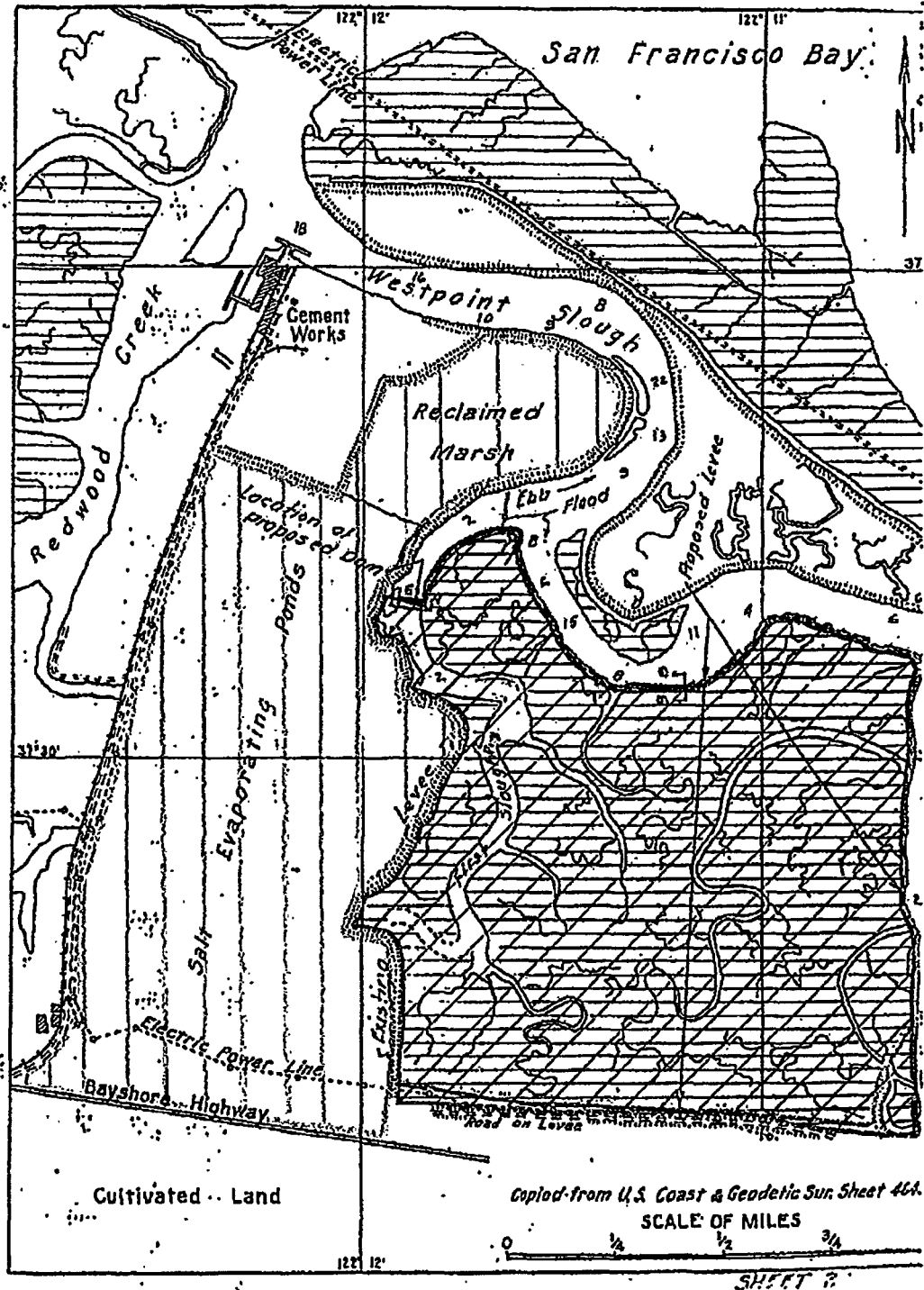
  
Earl H. Stockdale  
Chief Counsel

<sup>105</sup> The meaning of "navigable waters" as that term is used in the CWA has been ruled on by numerous courts, and more is required for a water to be a "navigable water" than just the capacity to float a boat. Waters need to be "susceptible of being used, in their ordinary condition, as highways for commerce" to be navigable-in-fact and thus a "navigable water" on the basis of their capacity to be navigated. *The Daniel Ball*, 77 U.S. 557, 563 (1870). Such susceptibility does not exist at the Redwood City site in its ordinary condition.

<sup>106</sup> *Milner*, 583 F.3d at 1196.

<sup>107</sup> *Id.*

# ATTACHMENT 1



"SHEET 2" from January 19, 1940 War Department Permit



**Supplement to "Legal Principles to Guide the Approved  
Jurisdictional Determination for the Redwood City Salt  
Plant" 9 January 2014**

CECC-ZA

25 March 2014

**Introduction**

This document supplements the 9 January 2014 memorandum titled "Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant" to address questions raised regarding positions taken in that document and to discuss new information and views that were subsequently provided by the Corps' San Francisco District. Specifically, this document addresses the determination of Rivers and Harbors Act of 1899 (RHA) jurisdiction over the western portion of the Redwood City salt plant site (parcel 1, shown in green on the map attached to the 9 January 2014 document). The previous writing concluded that RHA jurisdiction should not be exercised over the western portion of the site because that area was either never subject to RHA jurisdiction or because any RHA jurisdiction that arguably might have existed over that area had been surrendered.

The discussions between the Corps district, division, and headquarters personnel and a review of the additional information and recommendations provided by the San Francisco District prompted this further elaboration on the issue of surrender and RHA jurisdiction over the western parcel of the site. For the purposes of making an approved jurisdictional determination for the Redwood City site, it is unnecessary to establish a definitive, general rule on how and when surrender of RHA jurisdiction can occur in every situation and circumstance. Likewise, while there is evidence that major portions of the western parcel were never jurisdictional under RHA, it is unnecessary to trace in detail the jurisdictional status of the different areas of the site over time to determine how to proceed under the RHA. The history of permit actions for the site distinguishes the western parcel from those cases in which courts found that jurisdiction has not been surrendered and from the circumstances that were briefed in the *Cargill v. West* case in which the issue of surrender was raised but not litigated to finality with respect to another parcel of Bay-area property in the 1990s.<sup>1</sup>

The history specific to the western portion of the Redwood City salt plant site creates an unfavorable factual record that could form the basis for compelling arguments in any litigation brought by the landowner that either RHA jurisdiction never existed over the western portion of the site, or that any RHA jurisdiction that may have existed prior to the development of the site has been surrendered. The challenges created by the unfavorable factual record are

<sup>1</sup> *Cargill v. West, et al.*, No. C-92-20756-RMW (N.D. Cal. Dec. 23, 1994) (Order Denying Defendants' Motion to Dismiss and Remanding the Case to the Corps).

compounded by the lack of clarity on the legal standard regarding when there is a surrender of RHA jurisdiction. Because of these challenges, which would likely lead to an unfavorable legal precedent from the federal courts, the Corps shall decline to assert any RHA jurisdiction it arguably may have had or has over the western portion of the site.

#### Legal Standard for Surrender

There is scant case law on surrender of RHA jurisdiction that is pertinent to the circumstances at this site. As previously discussed, the leading case is *United States v. Stoeco Homes, Inc.* However, subsequent decisions have made clear that surrender will not be implied or be based on acquiescence, but must be in "unmistakable terms."<sup>2</sup> However, in the cases where surrender was found, the "unmistakable terms" that accomplished surrender were something less than an explicit statement by the government that regulatory jurisdiction or the navigation servitude was being surrendered or forfeited. There is no bright line rule that can be applied mechanically to determine if there is a surrender. Instead, the factual circumstances of any situation where surrender is a possibility should be evaluated in light of those few cases that have addressed claims that RHA jurisdiction or the navigation servitude was surrendered.<sup>3</sup>

Many cases that address surrender involve condemnation actions or takings claims, but there are several cases with analysis that may be relevant to claims that RHA jurisdiction has been surrendered.<sup>4</sup> Cases where courts have found that jurisdiction was not surrendered generally involved prior acquiescence to obstructions to navigation,<sup>5</sup> fill deposited by the United States in furtherance of navigation,<sup>6</sup> prior activities on tidal wetlands that did not destroy their wetland characteristics,<sup>7</sup> or disposition of fee interest in the land below the MHW mark.<sup>8</sup> The commonality between these cases is that the government action (or inaction) at issue in each case was taken without any statement regarding the jurisdictional status of the waters or former waters at issue, and there was no reasonable basis for expecting the property to be unhindered by the navigation servitude or RHA jurisdiction. In contrast, several cases found that RHA jurisdiction or the navigation servitude were surrendered based on some affirmative government statement regarding the status of RHA jurisdiction or the navigation servitude over the waters at issue, whether it was the formal establishment of harbor lines

<sup>2</sup> *US v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987); *Lambert v. JA Jones*, 835 F.2d 1105 (5th Cir. 1988).

<sup>3</sup> While there may be grounds for distinguishing regulatory jurisdiction under the RHA and the navigation servitude, as suggested by *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1991), there does not appear to be legal consensus that RHA jurisdiction can only be extinguished through equitable estoppel and not through the surrender analysis employed by the court in *Stoeco*. See *Cargill v. West, et al.*, No. C-92-20756-RMW (N.D. Cal. Jul 12, 1994) (Order on Dispositive Motions) (order applying surrender analysis to RHA jurisdiction after the U.S. argued that only equitable estoppel was applicable).

<sup>4</sup> The following is not intended to be an exhaustive examination of all cases addressing surrender.

<sup>5</sup> *U.S. v. Sasser*, 771 F.Supp. 720 (D. S.C. 1991).

<sup>6</sup> *US v. 49.79 Acres of Land, More or Less*, 582 F.Supp. 368 (D. Del. 1983).

<sup>7</sup> *U.S. v. Clamplitt*, 583 F.Supp. 483 (D. N.J. 1984).

<sup>8</sup> *US v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987).

behind which fill was given blanket authorization,<sup>9</sup> or entering into a stipulation agreement whereby certain promises were made by the United States to a landowner to protect the landowner's interests and improvements to property over which the navigation servitude was previously asserted.<sup>10</sup> In both of these cases, the court also found that the landowners had a reasonable basis for believing the land was unhindered by the navigation servitude or RHA jurisdiction.

#### History of the Western Portion of the Redwood City Site

The western portion of the Redwood City site (parcel 1, shown in green on the map attached to the 9 January 2014 document) has a long history of development and involvement by the Corps. Specifically, the three permits discussed below provide evidence of the Corps' understanding of the condition of the western parcel. These permit actions are sufficient for the landowner to make strong arguments that most if not all of that parcel was never subject to RHA jurisdiction, or that any RHA jurisdiction that may have existed over the western parcel has been surrendered.

There is no indication that there were any permits or other authorizations required for the construction of the levees around the western portion of the Redwood City site. This is consistent with the practice at the time of only requiring permits for those activities that would have affected the navigable capacity of navigable-in-fact waters.<sup>11</sup> In 1940, the War Department issued a permit for the construction of levees bordering the eastern portion of the site (parcel 2, shown in red on the map attached to the 9 January 2014 document), immediately adjacent to the western parcel.<sup>12</sup> The 1940 permit identifies the northern portion of the western parcel as "reclaimed marsh" and the rest of the western parcel as "salt evaporating ponds," showing that the western parcel had been developed by that time and that the Corps did not require permits for that work. Admittedly, the 1940 permit request did not propose any work for the western parcel, so representation of the western parcel in that permit is less pertinent to whether there was surrender over the western parcel than the eastern parcel. However, the permit does show that the Corps was aware that the western parcel had been improved for salt-making operations and was no longer in its natural condition. Again, no permits were required for the prior work on the western parcel.

A subsequent Department of War permit issued to Leslie Salt in 1947 more squarely addressed the circumstances of the western parcel.<sup>13</sup> That permit authorized the dredging of material from four separate areas (two areas within Redwood Creek, one area with Westpoint Slough, and one area within a diked area to the west of the western parcel) and the "deposit

<sup>9</sup> *Stoeco*, 498 F.2d 597 (3rd Cir. 1974).

<sup>10</sup> *U.S. v. 119.67 Acres of Land*, 663 F.2d 1328 (5th Cir. 1981).

<sup>11</sup> See *U.S. v. Alaska*, 503 U.S. 569, 580-81 (1992).

<sup>12</sup> War Department Permit Issued to Stauffer Chemical Company, January 16, 1940.

<sup>13</sup> War Department Permit Issued to Leslie Salt Company, April 26, 1947.

[of] the material removed on property belonging to the applicant *above the high water line.*<sup>14</sup> On the map accompanying the permit, the entire area in the western parcel previously identified in the 1940 permit as "salt evaporating ponds" is marked as "area to be filled." The logical interpretation of the language of the permit, read in conjunction with the accompanying map, is that the majority of the western parcel (that portion shown as "salt evaporating ponds" on the 1940 permit) was above the mean high water line in 1947, that is, it had been converted into fast land and was therefore not subject to RHA jurisdiction.<sup>15</sup> Additionally, the public notice soliciting comment on the application for the 1947 permit explicitly stated that the permit "expresses the assent of the Federal Government in so far as concerns the public rights of navigation," making it clear what resource impacts were of interest.<sup>16</sup> This permit did not address the northern-most portion of the western parcel shown as "reclaimed marsh" in the 1940 permit.

In addition, part of this northern-most portion of the western parcel (the "reclaimed marsh") was addressed in a much more recent permit action from 2002.<sup>17</sup> This permit was for the development of Westpoint Marina in part of the area formerly occupied by Cargill's "Pond 10" and that generally corresponds to the area shown as "reclaimed marsh" on the 1940 permit. This area had been used to store bittern. The project that was subject to the 2002 permit action involved construction of an upland area to support roadways and other facilities, as well as the excavation of the marina basin. The only activity that was subject to jurisdiction under the RHA was "work to breach the existing levee after marina construction has been completed." Thus, the Corps did not assert RHA jurisdiction over the interior portion of the site to be developed as Westpoint Marina.<sup>18</sup> It is true that the lack of jurisdiction over the interior portion of this area has little direct relevance to the jurisdictional status of the rest of the site, but it does constitute evidence of the Corps' consistent pattern of practice of not asserting RHA jurisdiction over the western parcel.

### Analysis of Law and Fact

The law regarding surrender is not well defined; there exists significant ambiguity as to what qualifies as the "unmistakable terms" required for there to be a surrender. The cases in which courts found that there was surrender involved some affirmative statement by the government about the jurisdictional status of the property (even if only as a class), as opposed to actions or inaction that did not purport to address jurisdiction. In the case of the western portion of the Redwood City site, there are multiple affirmative statements from the Corps that

<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> *U.S. v. Willow River Power Co.*, 324 U.S. 499, 509 (1945) ("High-water mark bounds the bed of the river. Lands above it are fast lands. . .").

<sup>16</sup> War Department, Corps of Engineers San Francisco District, Public Notice No. 47-43, March 28, 1947 (emphasis in original).

<sup>17</sup> USACE San Francisco District, *Public Notice; Project: WestPoint Marina*, Permit No. 22454S (May 17, 2002).

<sup>18</sup> In the permit for the Westpoint Marina, the Corps asserted RHA jurisdiction over work within the interior of the marina basin once the exterior levee was breached and the basin was inundated with water directly from the Bay.

could reasonably be interpreted to qualify as the type of unmistakable terms that the court relied on in *Stoeco* to find a surrender of any regulatory jurisdiction that may have existed. This is in contrast to the eastern portion of the site, where the initial activity modifying the natural topography was subject to a permit that contained an explicit reservation of jurisdiction.

Should the Corps assert RHA jurisdiction over any portion of the western parcel, there is a substantial likelihood that the property owner would challenge that assertion of jurisdiction in the federal courts. Given the uncertain law and the unfavorable facts regarding surrender in this circumstance, there is a high likelihood that a court could make bad law on surrender were the Corps to assert RHA jurisdiction over the western portion of the Redwood City site.

#### Alternative Interpretation of RHA Jurisdiction under *Froehlike* and *Milner*

In discussions with the San Francisco District about the 9 January 2014 memorandum, an alternative interpretation of the legal standard for RHA jurisdiction that should be derived from *Froehlike* and *Milner* was proffered.<sup>19</sup> It was suggested that the rule established in *Froehlike* and followed in *Milner* that RHA jurisdiction "extend[s] to all places covered by the ebb and flow of the tide to the mean high water (MHW) mark in its unobstructed, natural state" should be interpreted to mean that any area that *is currently* below the theoretical plane of the MHW mark projected across the landscape or that *would currently be* below this theoretical plane but for an artificial improvement (such as a levee as in *Froehlike* or a shore defense structure as in *Milner*, but possibly including other artificial improvements) is subject to RHA jurisdiction. Thus, in the case of a low-lying area separated from tidal waters by a levee, the levee and any area behind it that is below the elevation of the current MHW mark would be currently subject to RHA jurisdiction even if those areas had never been covered by water in the past.

Neither *Froehlike* nor *Milner* require this interpretation. The *Froehlike* decision merely determined whether the relevant benchmark for jurisdiction on the Pacific was the MHW mark or the mean higher high water (MHHW) mark, and did not apply the standard established to the circumstances in the case, so it is impossible to know how that court intended the standard to be implemented.<sup>20</sup> The *Milner* decision only held that the shore defense structures that were previously above the MHW mark at the time that they were constructed, but have come to be, at least in part, below the MHW mark now (because of erosion, sea level rise, or other changes), are now subject to RHA jurisdiction.<sup>21</sup> The court in *Milner* did not make any explicit holding regarding RHA jurisdiction over lands lying on the upland side of those shore defense structures. Thus, neither case held that land that is currently below the projected plane of the MHW line in its unobstructed natural state, but that currently is not covered with water due to

<sup>19</sup> *Leslie Salt Co. v. Froehlike*, 578 F.2d 742, 753 (9th Cir. 1978) (hereinafter "*Froehlike*"); *U.S. v. Milner*, 583 F.3d 1174, 1191 (9th Cir. 2009).

<sup>20</sup> *Froehlike*, 578 F.2d at 753.

<sup>21</sup> *Milner*, 583 F.3d at 1193.

an artificial obstruction, is now subject to RHA jurisdiction. The standard established for RHA jurisdiction in the 9 January 2014 memo is consistent with the holdings of *Froehlke* and *Milner*, more closely follow the Corps regulations implementing the RHA, and has more defensible implications for what areas may currently be jurisdictional under the RHA.

However, even if one were to accept the San Francisco District's alternative interpretation of the rule dictated by *Froehlke* and *Milner*, a court reviewing the matter would likely find that there is no RHA jurisdiction over the western parcel based on the San Francisco District's long-standing and well-publicized policy for determining RHA jurisdiction behind dikes or levees. The policy provides:

Section 10 [RHA] jurisdiction will be exercised over areas behind dikes if all of the following criteria are met:

1. The area is presently at or below mean high water (MHW),
2. The area was historically at or below MHW in its "unobstructed, natural state" (i.e., the area was at or below MHW before the dikes were built), and
3. There is no evidence (elevation data) that the area was ever above MHW.<sup>22</sup>

Applying the evidence previously discussed to the rules established in the San Francisco District policy would result in a strong case that no RHA jurisdiction now can be or should be exercised. Specifically, the western portion of the site appears to fail the second and possibly the third elements of the District policy. As previously discussed, the 1947 permit indicates that the area identified as "salt evaporating ponds" on the 1940 permit was above MHW at the time of the 1947 permit evaluation, meaning that the third element is not satisfied. The evidence is less direct for the area identified as "reclaimed marsh" in the 1940 permit, but the 1940 permit along with the 2002 Westpoint Marina permit and maps that predate the development of the site all suggest that the "reclaimed marsh" area was above MHW either before the levees were constructed or were made so subsequently, and therefore fails either the second or third elements of the policy, or both. If the Corps were now to try to assert RHA jurisdiction over the western portion of the site, a reviewing federal court likely would rule that the Corps is now estopped from asserting RHA jurisdiction, because the owners of that portion have relied on the District policy that precludes the assertion of jurisdiction since at least 1983, the year in which the policy was promulgated.

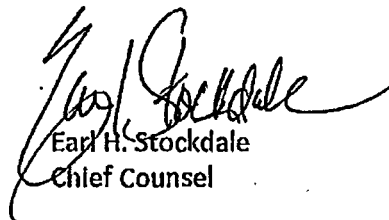
## **Conclusion**

The landowners of the Redwood City salt plant site have several strong legal arguments supporting their position that RHA jurisdiction should not be exercised over the western

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<sup>22</sup> Calvin Fong, Chief, Regulatory Functions Branch, *Reg. Functions Bull. Memorandum, Regulatory Function's Policy on Section 10 Jurisdiction Behind Dikes (Levees)* (May 25, 1983) (emphasis in original; internal citations omitted).

portion of the stie. There is substantial evidence that would receive deference from the Federal courts that any RHA Jurisdiction that may have existed over the western portion of the site was surrendered, or alternatively that jurisdiction should not be exercised based on long-standing District policy. Therefore, as a matter of judgment and risk calculation, based on the specific facts and history discussed above, which are unique to the site, the Corps shall decline to assert any RHA Jurisdiction that it may be able to claim over the western portion of the Redwood City site.



Earl H. Stockdale  
Chief Counsel

## Downing, Donna

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**Subject:** Cargill  
**Location:** JG Office

**Start:** Wed 10/22/2014 12:30 PM  
**End:** Wed 10/22/2014 1:00 PM  
**Show Time As:** Tentative

**Recurrence:** (none)

**Meeting Status:** Not yet responded

**Organizer:** Kaiser, Russell  
**Required Attendees:** Goodin, John; Downing, Donna

## Downing, Donna

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**From:** Evans, David  
**Sent:** Tuesday, December 16, 2014 3:46 PM  
**To:** Best-Wong, Benita; Goodin, John; Kaiser, Russell; Downing, Donna  
**Subject:** Cargill JD

Benita and all,

I spoke briefly with John earlier after getting a call from David Lewis of Save SF Bay, who has closely followed the Cargill/Redwood City jurisdictional determination issue past many years.

David said he'd spoken with Jared, Alexis and Regional Counsel in Region 9 earlier this week, and they understand the SF District has received the Army's revised legal analysis of policy considerations relevant to the JD. They had initially heard that the District would issue a final JD by the end of this week, but that seems to be evolving. My understanding from speaking with Gautam a few months back is that Army Counsel would share their analysis with us so that we would not be caught off-guard with a final JD.

I know OGC had a call this afternoon with Region 9 – and we should be sure to quickly catch up on state of play. If EPA wishes to influence the jurisdictional determination, will be important to engage before District issues their final JD.

Dave

*David Evans*, Deputy Director  
Office of Wetlands, Oceans and Watersheds  
[Evans.David@epa.gov](mailto:Evans.David@epa.gov)  
202-566-0535

## Downing, Donna

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**From:** Brush, Jason  
**Sent:** Wednesday, December 17, 2014 12:48 PM  
**To:** Evans, David; Kaiser, Russell; Goodin, John  
**Cc:** Downing, Donna  
**Subject:** Fw: Cargill JD

FYSA. Jane Diamond and Nancy Woo may reach out to you as well.

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

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**From:** Peck, Gregory <Peck.Gregory@epa.gov>  
**Sent:** Wednesday, December 17, 2014 9:26 AM  
**To:** Campbell, Rich; Srinivasan, Gautam; Wendelowski, Karyn; Neugeboren, Steven  
**Cc:** Quast, Sylvia; Kermish, Laurie; Diamond, Jane; Brush, Jason; Scianni, Melissa; Goodin, John  
**Subject:** RE: Napa JD

Thanks Rich. We'll look forward to our Friday conversation and your thoughts about potential middle ground.

Best,  
Greg

Gregory E. Peck  
Chief of Staff  
Office of Water  
1200 Pennsylvania Avenue  
Washington, D.C. 20460

202-564-5700

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**From:** Campbell, Rich  
**Sent:** Wednesday, December 17, 2014 12:22 PM  
**To:** Srinivasan, Gautam; Wendelowski, Karyn; Peck, Gregory; Neugeboren, Steven  
**Cc:** Quast, Sylvia; Kermish, Laurie; Diamond, Jane; Brush, Jason; Scianni, Melissa  
**Subject:** Napa JD

All,

Following-up on yesterday's conversation, we've attached the following documents related to the 1994 Cargill Napa Plant Site JD:

1. 1994 Corps JD Letter (referenced maps not included. We only have poster sized, black and white maps of poor quality);
2. 1994 Corps Memo for the Record;
3. 1994 Corps Martel wetland delineation memo;
4. Google Earth aerial image of the Napa Plant Site from 2002;
5. Google Earth aerial image of SF Bay showing the Napa and Redwood City plant site locations; and

6. 1998 EPA Region 9 Staff Memo by Tom Yocum to the File. The memo includes legal analysis. Though the legal analysis did not come from ORC, Mr. Yocum was a widely-recognized national expert in the field of 404 jurisdiction.

Please call if you need something more.

Thanks,

Rich

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